TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 894. 57.

THE HOME FOR INCURABLES, APPELLANT,

vs.

MARY SPENCER NOBLE ET AL.

FILED FEBRUARY 10, 1897.

No. 900. 61.

EMELINE COLVILLE, APPELLANT,

vs.

THE AMERICAN SECURITY AND TRUST COMPANY.

FILED FEBRUARY 19, 1897.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(16,490 & 16,496.)

(16,490 & 16,496.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 304.

THE HOME FOR INCURABLES, APPELLANT,

vs.

MARY SPENCER NOBLE ET AL.

FILED FEBRUARY 10, 1897.

No. 309.

EMELINE COLVILLE, APPELLANT,

vs.

THE AMERICAN SECURITY AND TRUST COMPANY.

FILED FEBRUARY 19, 1897.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

EMELINE COLVILLE, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Trustee, } No. 614.

and

MARY SPENCER NOBLE *et al.*, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, *et al.* } No. 615.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, Trustee under the Last Will and Testament of Mary E. Ruth, Deceased, Complainant,
vs.
MARY SPENCER NOBLE, PATTIE BELLE Tilghman, Jonathan Perry Harrison, Jr., a Minor; Samuel Alexander Harrison and Lucy Bird Harrison, Minors; Bradford O. Harrison, Lydia Caroline Harrison, a Minor; Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer, Emily H. Hayden, The Hospital of the University of Pennsylvania, The Home for Incurables, and Emeline Colville, Defendants. } In Equity. No. 16834, Docket No. 39.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Filed October 2, 1895.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, Trustee under the Last Will and Testament of Mary E. Ruth, Deceased, Complainant,

vs.

MARY SPENCER NOBLE, PATTIE BELLE Tilghman, Jonathan Perry Harrison, Jr., a Minor; Samuel Alexander Harrison and Lucy Bird Harrison, Minors; Bradford O. Harrison, Lydia Caroline Harrison, a Minor; Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katherine C. Spencer, Emily H. Hayden, The Hospital of the University of Pennsylvania, The Home for Incurables, and Emeline Colville, Defendants.

In Equity. No. 16834, Doc. No. 39.

ORIGINAL BILL.

The complainant respectfully shows unto the court:

1.

That it is a corporation duly organized, existing, and doing business in the District of Columbia by virtue of the authority of an act of Congress approved October 1, 1890, and authorized to act as administrator, executor, and trustee, and brings this suit as trustee under the last will and testament of Mary E. Ruth, deceased.

2.

That heretofore, to wit, on or about the 16th day of June, 1892, Mary E. Ruth, a resident of the District of Columbia, departed this life testate; that in and by her last will and testament she constituted and appointed your complainant the executor thereof and gave, devised, and bequeathed all of her estate, real, personal, or mixed, in and upon the trusts in said will set forth and declared, that is to say, in trust to invest and reinvest and pay the net income arising therefrom to the guardians of her grand-daughter, Sophia Yuengling Huston, during the period of her minority for her support and maintenance, or so much thereof as should be necessary for such purpose, and thereafter, upon her attaining the age of twenty-one years, to pay over to her the entire income during her life, subject, however, to certain conditions and restrictions. Said will further provides that in the event of the death of said grand-

3 daughter, or in case she should forfeit her right to receive said income by reason of a violation of the condition therein, that the trusts therein created should cease and be determined, and thereupon directed your complainant to convey and deliver so much of said estate as amounts to five thousand dollars to the Hospital of the University of Pennsylvania, to endow and maintain a perpetual bed in memory of her son, Melancthon L. Ruth. Said will further gave, devised, and bequeathed all the rest and residue of said estate to the "Home for Incurables" at Fordham, New York city, in the State of New York, to be used by said "home" to endow and forever maintain one or more beds in said "home" in memory of her said son. Said will is dated the first day of June, A. D. 1892, and was duly executed. Thereafter and on the same day said executrix made and executed a codicil to her said last will and testament, wherein and whereby she revoked and annulled the before-mentioned bequest to the "Home for Incurables" at Fordham, New York city, in the State of New York, and in lieu thereof made a bequest in the language following, to wit:

"I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress." Both said will and codicil were duly proved and admitted to probate and record on the 24th day of June, A. D. 1892. A certified copy of said will and codicil and of the letters testamentary granted thereon are herewith filed and marked Exhibit "A" with bill and prayed to be read and taken as part of this bill.

3.

Letters testamentary were granted unto your complainant on the 28th day of June, A. D. 1892, and thereupon your complainant entered upon the performance of the trusts in it reposed and by said will and under said letters testamentary.

4.

That said Mary E. Ruth died seized and possessed of a considerable property, both real and personal, the real estate consisting of a farm about one hundred and sixty acres of land and situate in the county of Talbot, in the State of Maryland, near the town of St. Michaels, and real estate in Washington, D. C.; that the personal estate consisted principally of money in bank, bonds and real-estate notes secured by deeds of trust, and household furniture, schedules of which, being copy of the inventory of the personal estate as appraised by the probate court, *is* herewith filed, marked Exhibits "B" and "C" with bill, and *is* prayed to be read and taken as a part of this bill of complaint.

Your complainant further shows that on or about the eight- day of October, 1892, it, as trustee under the will of said testatrix, sold and disposed of said real estate and received therefor the net sum of $4,895.24, and thereafter invested the proceeds in the same man-

4 ner as it has invested other money belonging to the estate, to wit, in interest-bearing securities and notes secured on real estate by first deeds of trust.

5.

That on the seventh day of September, 1894, your complainant exhibited a first and final account of its administration of the estate of said testatrix, and said account was duly approved and passed upon; thereupon your complainant took said estate as trustees, according to the terms and provision- of said last will and testament, and proceeded to discharge its duty as such trustee; that as such trustee there was delivered to it, under the order and direction of this court, holding a special term for orphans' court business, money and securities of great value, to wit, of the value of about $16,769.24, a schedule of the same being filed herewith, marked Exhibit "D" with bill, prayed to be read and taken as a part of this bill.

That as trustee complainant now holds in its hands, in money and securities, a total sum of about thirty thousand dollars, being the proceeds of sale of the before-named farm, the sum turned over to it by the orphans' court, and the proceeds for the sale of other real estate and the accumulation of unexpended income.

6.

That said testatrix left surviving her, as her next of kin and heirs-at-law, as your complainant is informed and believes and hence avers, the following-named persons:

Mary Spencer Noble, wife of Horace Noble, of Baltimore, Md.; Pattie Belle Tilghan, wife of Oswald Tilghan, of Easton, Talbot county, Md., daughter of Dr. Samuel A. Harrison, deceased, a brother of the testatrix, and the following-named children and grandchild of Jonathan Perry Harrison, deceased, a brother of the whole blood, three of whom are minors:

Jonathan Perry Harrison, Jr. (minor), Houston, Texas; Samuel Alexander Harrison (minor), Lucy Bird Harrison (minor), and Bradford O. Harrison, St. Louis, Mo.; Lydia Caroline Harrison, a grand-daughter of said Jonathan Perry Harrison and daughter of Addison Blaney Harrison, who was a son of the before-named Jonathan Perry Harrison, said Lydia now residing at No. 33 Taylor street, West New Brighton, Staten Island, New York; Eleanor Susanna Willis, wife of William Willis, St. Michaels, Maryland, only child of Emily Harrison, a sister of the whole blood of testatrix; Robert Leigh Spencer, Webster Lindsley Spencer, Katherine C. Spencer, Emily H. Hayden, wife of Charles S. Hayden, of the city of Baltimore, State of Maryland, children of Ann C. B. Spencer, a sister of the half blood.

7.

That the Hospital of the University of Pennsylvania is named as a legatee in said will; that the Home for Incurables, at Fordham,

New York city, is a legatee named in the will, and Emeline Colville is a legatee named in the codicil to said will.

8.

That Sophia Yuengling Huston, the grand-daughter of said testatrix and the beneficiary under said last will and testament during her lifetime, departed this life on or about the 4th day of April, 1895, not yet having attained the age of twenty-one years, whereby and by reason whereof, according to the provisions of said will, the trusts under it reposed in your complainant should cease and be determined, and the estate remaining in its hands should be distributed according to the directions of said will.

9.

That because of ambiguity and inconsistency apparent upon the face of said will and codicil your complainant is in doubt as to whom it should distribute the fund and estate in its hands, and it is advised by counsel and believes, and hence avers, that it cannot safely proceed further in the administration of the trusts upon it conferred by and under said will and codicil except under the order and direction of this honorable court.

To the end, therefore, that this court may take jurisdiction in the premises, and may advise and direct your complainant in the further administration of said trust, complainant prays:

1.

That the writ of subpœna may issue out of this court, directed to the defendants and each of them, requiring them and each of them to appear and answer the exigency of this bill of complaint.

2.

That this cause may be referred to the auditor of this court to state an account for distribution according to a proper construction of said will and codicil.

3.

That an account may be taken and testimony adduced before such auditor as may seem necessary and proper in the premises.

4.

That your complainant may be allowed out of the fund in its hands its necessary expenses incurred in and about the premises, including counsel fees, together with a reasonable commission for the performance of its trust.

5.

That your complainant may have such other and further relief

6 in the premises as to the court may seem necessary and proper and as the nature of its case may require.

AMERICAN SECURITY AND TRUST COMPANY,
[SEAL.] By WM. A. McKENNEY, *Trust Officer.*

WM. A. McKENNEY,
Sol'r for Complainants.

The defendants to this bill are Mary Spencer Noble, Pattie Tilghman, Jonathan Perry Harrison, Jr., a minor; Samuel Alexander Harrison and Lucy Bird Harrison, minors; Bradford O. Harrison, Lydia Caroline Harrison, a minor; Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katherine C. Spencer, Emily H. Hayden, The Hospital of the University of Pennsylvania, The Home for Incurables, and Emeline Colville.

I, William A. McKenney, being first duly sworn, depose and say that I am the trust officer of The American Security and Trust Company, complainant named in the foregoing bill, by me as such officer subscribed; that I have read the same and know the contents thereof; that the matters and things therein stated upon personal knowledge are true and those stated upon information and belief I believe to be true.

WM. A. McKENNEY.

Subscribed and sworn to before me this 2d day of Oct., A. D. 1895.

J. R. YOUNG, *Clerk, &c.*,
By R. J. MEIGS,
Assistant Clerk.

EXHIBIT "A" WITH BILL.

Filed October 2, 1895.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America to all persons to whom these presents shall come, Greeting:

Know ye that the last will and testament of *Mary Eleanor Ruth*, late of the District of Columbia, deceased, hath in due form of law been exhibited, proved, and recorded in the office of the register of wills for the District of Columbia, a copy of which is to these presents annexed, and administration of all the goods, chattels, and credits of the deceased is hereby granted and committed unto American Security and Trust Company, the *executor* by the said will appointed.

7 Witness *Andrew C. Bradley*, justice holding the special term of the said supreme court for orphans' court business, [SEAL.] this *28th* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-two*, and of the Independence of the United States the one hundred and *sixteenth*.

Test: L. P. WRIGHT,
Register of Wills for the District of Columbia.

I, Percy B. Metzger, treasurer and trust officer of the American Security & Trust Co., do swear that it will well and truly administer the goods, chattels, personal estate, and credits of Mary Eleanor Ruth, late of the District of Columbia, deceased, to the best of its knowledge, according to law, and will give a just account of its administration when thereto it shall be lawfully called, so help me God.

PERCY B. METZGER,
Treasurer & Trust Officer of American Security and Trust Co.

Sworn and subscribed to before me this 28th day of June, A. D. 1892.

Test: L. P. WRIGHT,
Register of Wills.

Will.

I, Mary Eleanor Ruth, residing in the city of Washington and the District of Columbia, being of sound and disposing mind and memory, do make and publish and declare this to be my last will and testament, hereby revoking and making null and void any and all former wills and codicils by me at any time made.

First. I direct my executor hereinafter named to first pay out of my estate my funeral expenses and all just debts.

Second. I give devise and bequeath all of my estate, real personal or mixed, whether in possession, revision or remainder now required or hereafter to be acquired and wheresoever situate to the "American Security and Trust Company" of Washington city District of Columbia its successors and assigns, in trust nevertheless for the following uses and purposes only, that is to say—

To invest and to reinvest the proceeds of my said estate in its discretion from time to time in any of the following classes of securities; that is either in United States bonds or in municipal or State bonds or in the first-mortgage bonds of dividend-paying railroads or in loans secured by first trusts upon real estate in the District of Columbia, said loans not to exceed three-fourths market value of said real estate; and to pay over so much of the annual income from said investments and reinvestments to the guardian or guardians of my grand-daughter Sophia Yuengling Huston, as may be sufficient to provide for her maintenance, education and support until she becomes of the full age of twenty-one years, after which period the entire income so annually received

8 from said investments and reinvestments shall be paid over by said trustee to my said grand-daughter for her sole use and benefit for and during the period of her natural life. Provided however that the income thus provided for my said grand-daughter for and during the term of her natural life shall sooner cease and determine at any time when it is ascertained by my said trustee that any part of my said income shall have been given by said grand-daughter, or in anywise expended by or through her for the use or benefit of Robert J. Huston, from whom her mother, my daughter, obtained a divorce with custody of said Sophia Yuengling Huston given absolutely to her said mother. In case the income shall so cease and determine before the death of my said grand-daughter then said income, and all accumulations thereof and the entire principal of said trust estate shall be disposed of as provided in the next succeeding. Item of this my last will and testament.

I further authorize my aforesaid trustee to sell any portion of the estate herein conveyed to it in trust as aforesaid and to invest and reinvest the proceeds as hereinbefore provided giving to purchasers good and sufficient deeds or other evidences of title, without obligation upon the part of said purchasers to see to the application of the purchase-money.

Third. In the event of the death of my said grand-daughter Sophia Yuengling Huston or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the "American Security and Trust Company" shall cease and be determined and so much of my said estate shall thereupon be conveyed and delivered over by said American Security and Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia said bed to be in the name and memory of my beloved son Malancthon Love Ruth.

All the residue and remainder of my said estate of whatever kind after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital I give devise and bequeath to the "Home for Incurables" at Fordham, New York city, in the State of New York its successors and assigns forever to be used by said "Home for Incurables" to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth.

Fourth. I nominate and appoint Mary Robinson Wright wife of J. Hood Wright of New York city and Mary Robinson Markle wife of John Markle of Hazelton Pennsylvania and the survivors of them to be the guardians or guardian of the property and the person of my said grand-daughter Sophia Yuengling Huston they and each of them being my valued friends and having consented to act in that behalf.

Fifth. I hereby nominate and appoint the "American Security

9 and Trust Company" of Washington city, District of Columbia to be the sole executor of my estate.

In witness whereof I have hereunto set my hand this first day of June in the year of our Lord eighteen hundred and ninety-two.

MARY E. RUTH.

Signed and published in our presence by the above-named Mary Eleanor Ruth as and for her last will and testament, who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

HENRY WISE GARNETT.
WALTER V. R. BERRY,
416 *5th St.*
HARVEY S. W. DE GAW,
416 *5th St. N. W.*

Form 2.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared Henry Wise Garnett, one of the subscribing witnesses to the foregoing last will and testament of Mary E. Ruth, late of the District of Columbia, deceased, and solemnly made oath on the Holy Evangels of Almighty God that he did see the testatrix therein named sign this will; that she published, pronounced, and declared the same to be her last will and testament; that at the time of so doing she was, to the best of his apprehension, of sound and disposing mind and capable of executing a valid deed or contract, and that his name as witness to the aforesaid will was signed in the presence and at the request of testatrix and in the presence of the other subscribing witnesses thereto.

Test: L. P. WRIGHT,
Register of Wills.

I, Mary Eleanor Ruth being of sound and disposing mind and memory and understanding do make and publish this codicil to my last will and testament—I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham New York city in the State of New York and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

In witness whereof I have hereto affixed my name this first day of June in the year of our Lord eighteen hundred and ninety-two and I in all other things ratify and affirm my said will.

MARY E. RUTH.

10 Signed and published in our presence by the above-named Mary Eleanor Ruth as and for a codicil to her last will and testament, who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

HENRY WISE GARNETT.
WALTER V. R. BERRY, 416 *5th St.*
HARVEY S. W. DE GAW,
416 *5th St. N. W.*

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMAIA, *To wit:*

JUNE 23RD, 1892.

This day appeared Henry Wise Garnett, one of the subscribing witnesses to the aforegoing codicil to the last will and testament of Mary E. Ruth, late of the District of Columbia, deceased, and solemnly made oath on the Holy Evangels of Almighty God that he did see the testatrix therein named sign this codicil; that she published, pronounced, and declared the same to be a codicil to her last will and testament; that at the time of so doing she was, to the best of his apprehension, of sound and disposing mind, memory, and understanding and capable of executing a valid deed or contract, and that his name as witness to the aforesaid codicil was signed in the presence and at the request of the testatrix and in the presence of the other subscribing witnesses thereto.

Test: L. P. WRIGHT,
Register of Wills.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

JUNE 24TH, 1892.

This day appeared Walter V. R. Berry and Harvey S. W. De Gaw, two of the subscribing witnesses to the aforegoing codicil to the last will and testament of Mary E. Ruth, late of the District of Columbia, deceased, and severally made oath on the Holy Evangels of Almighty God that they did see the testatrix therein named sign this codicil; that she published, pronounced, and declared the same to be a codicil to her last will and testament; that at the time of so doing she was, to the best of their apprehension, of sound and disposing mind, memory, and understanding and capable of executing a valid deed or contract, and that their names as witnesses to the aforesaid codicil were signed in the presence and at the request of the testatrix and in the presence of the other subscribing witness thereto.

Test: L. P. WRIGHT,
Register of Wills.

11 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, *Levi P. Wright, register of wills* for the District of Columbia and *ex officio* clerk of the said special term for orphans' court business, do hereby certify that the aforegoing is a true copy of the original *will* and *codicil* of *Mary E. Ruth*, deceased, and the probates thereto filed and recorded in the office of the register of wills for the District of Columbia aforesaid, and also that the said *will* and *codicil*, after having been proven by the witnesses whose names appear in the foregoing probates, was by order of the supreme court of the District of Columbia, holding a special term for orphans' court business, duly admitted to probate and record on the *24th* day of *June*, A. D. *one thousand eight hundred* and ninety-*two*.

In testimony whereof I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this *29th* day of *June*, anno Domini *1892*.

[SEAL.] L. P. WRIGHT,
Register of Wills for District of Columbia and ex Officio Clerk of the said Special Term for Orphans' Court Business.

* * * * * * *

Answer of the Hospital of the University of Penn.

Filed January 6th, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, Trustee under the Last Will and Testament of Mary E. Ruth, Deceased, Complainant,
vs.
MARY SPENCER NOBLE, PATTIE BELLE Tilghman, Jonathan Perry Harrison, Jr., a Minor; Samuel Alexander Harrison and Lucy Bird Harrison, Minors; Bradford O. Harrison, Lydia Caroline Harrison, a Minor; Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katherine C. Spencer, Emily H. Hayden, The Hospital of the University of Pennsylvania, The Home for Incurables, and Emeline Colville, Defendants.
} In Equity. No. 16834, Docket No. 39.

The answer of the defendant The Hospital of the University of Pennsylvania.

1.

This defendant admits the allegations contained in the first paragraph of the bill.

2.

This defendant admits the allegations contained in the second paragraph of the bill. Further answering, this defendant says it is entitled as legatee to the sum of five thousand dollars ($5,000.00) under the will of the said Mary E. Ruth, deceased, and claims all of its rights in and to said sum of money as legatee.

3.

In reply to the allegations contained in the third paragraph of the bill, this defendant admits the same.

4.

This defendant has no personal knowledge of the allegations contained in the fourth paragraph of the bill, but believes the same to be true and on information and belief admits the same.

5.

This defendant has no personal knowledge of the allegations contained in the fifth paragraph of the bill, but on information and belief admits the same to be true.

6.

In reply to the allegations contained in the sixth paragraph of the bill, this defendant has no knowledge thereof and can neither admit nor deny the same, but asks for proof as to the truth of the said allegations.

7.

In reply to the allegations contained in the seventh paragraph of the bill, this defendant admits that it is a legatee under the will of the said Mary E. Ruth, deceased, to the extent of five thousand dollars ($5,000.00), and asks that the same and all increase thereon may be by the decree of this honorable court *be* directed to be paid over to this defendant by the complainant as executor of said will. This defendant has no knowledge of the other facts alleged in the said seventh paragraph of the bill, and neither admits nor denies the same.

8.

In reply to the allegations contained in the eight- paragraph of the bill, this defendant on information and belief admits the same to be true.

9.

In reply to the allegations contained in the ninth paragraph of the bill, this defendant denies that it is an ambiguity in the said will with reference to the legacy to this defendant, but this defendant is plainly and unquestionably entitled to said legacy, and asks that by decree of this honorable court the same and all increase

13 thereon may be directed to be paid over to it by the complainant. This defendant neither admits nor denies the other allegations contained in this paragraph, but calls for proof of the same.

And this defendant, having fully answered, prays to be hence discharged with its reasonable costs in this cause incurred.

HENRY WISE GARNETT,
Sol'r for Def't The Hospital of the University of Pennsylvania.

Separate Answer of the Home for Incurables.

Filed January 7, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, Trustee under the Last Will and Testament of Mary E. Ruth, Deceased, Complainant, *vs.* MARY SPENCER NOBLE *et al.*, Defendants.	In Equity. No. 16834.

Separate answer of the Home for Incurables.

The separate answer of The Home for Incurables (a New York corporation), one of the defendants, to the bill of complaint in the above-entitled cause, reserving all right of exception and objection to defects in said bill, respectfully shows to the court as follows:

First. On information and belief this defendant admits the averments contained in the first paragraph of said bill.

Second. This defendant likewise admits the averments of fact contained in the second paragraph of said bill, but does not admit the construction in said paragraph placed upon the codicil to the will of Mary E. Ruth, which said codicil is there alleged to have revoked and annulled the bequest of devise made in said will to this defendant; and this defendant says that it is advised by legal counsel that the construction of said codicil is matter of law which this defendant is not required to answer.

Third. This defendant admits the averments contained in the third paragraph of said bill, but craves leave to refer when necessary to the originals of the records referred to in said bill.

Fourth, fifth, and sixth. As to the averments contained in the fourth, fifth, and sixth paragraphs of said bill, as to the proceedings of complainant and as to the next of kin of testatrix, this defendant says it is without knowledge and can neither admit nor deny the same.

Seventh and eight-. This defendant admits the averments contained in the seventh and eight- paragraphs of said bill.

Ninth. This defendant admits that there is ambiguity apparent upon the face of the said will and codicil, taken together, and joins

14 in the prayer of the complainant for the construction of said will and codicil. It submits that thereupon it will appear that the residuary devise and bequest to this defendant is not revoked, or if revoked at all only to the extent of the five thousand dollars ($5,000) mentioned in said codicil.

Tenth. Further answering said bill, this defendant avers that it is a charitable corporation, duly incorporated and existing under the laws of the State of New York; that although by statutes in force in said State the amount of property which may be held by charitable corporations in the State of New York is limited to three million dollars ($3,000,000) and the yearly income that may be derived therefrom is restricted to five hundred thousand dollars ($500,000), nevertheless the property, real and personal, held and owned by this defendant does not exceed in value the sum of about seven hundred and fifty thousand dollars ($750,000) and the yearly income derived therefrom does not exceed the sum of about sixty thousand dollars ($60,000), and this defendant says it is competent under the laws of New York to take and hold the whole of the residuary estate of said Mary E. Ruth, deceased, for the purposes in said will specified.

Having thus answered, this defendant respectfully submits its rights in the premises to the protection of this honorable court.

HOME FOR INCURABLES,
By G. SHERMAN, *Treasurer.*

J. S. FLANNERY,
Solicitor for Defendant The Home for Incurables.

STATE OF NEW YORK, }
City of New York, } ss.:

I, George Sherman, do solemnly swear that I am the treasurer of The Home for Incurables, a New York corporation and one of the defendants in the above-entitled cause; that I have read the answer by me subscribed in the name and on behalf of said corporation and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

G. SHERMAN.

Sworn and subscribed to before me this 4th day of January, A. D. 1896.

[SEAL.] ADDISON GARDNER,
Notary Public (No. 105), N. Y. County.

STATE OF NEW YORK, }
City and County of New York, } ss.:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and
[SEAL.] county, the same being a court of record, do hereby certify that Addison Gardner, before whom the annexed deposition was taken, was at the time of taking the same a notary public

15 of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county the 6 day of Jan'y, 1896.

HENRY D. PURROY, *Clerk.*

Separate Answer and Demurrer of Emeline Colville.

Filed January 17, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY, &c.,
vs.
MARY SPENCER NOBLE *et al.*
} Equity. No. 16834.

The separate answer of Emeline Colville, one of the defendants in the above-named cause.

First.

The defendant has no knowledge enabling her to admit or deny the allegations of the incorporation of the above-named complainant; she admits that the suit is brought as trustee under the last will and testament of Mary E. Ruth, deceased.

Second.

This defendant has no personal knowledge as to the date of the death of the said Mary E. Ruth. This defendant admits the correctness of the remaining allegation of this paragraph.

Third.

This defendant has no knowledge of the matters alleged in the third paragraph, but believes them to be correctly stated.

Fourth.

This defendant has no knowledge of the matters contained in this paragraph, and, so far as the same may be material, calls for strict proof thereof.

Fifth.

This defendant has no knowledge of the matters alleged in the fifth paragraph, and, as far as the same may be material, calls for strict proof thereof.

Sixth.

This defendant demurs to the allegations contained in the sixth paragraph, and for cause of demurrer says that the persons therein named and alleged to be next of kin and heirs-at-law of the said Mary E. Ruth, deceased, are not and cannot be proper parties to this proceeding for the reason that the said Mary E. Ruth, deceased, in and by her last will and testament and codicil thereto has made a complete disposition of all her property, real and personal, and none of the persons enumerated in said paragraph sixth are in any manner referred to as legatees or devisees in said last will and testament and codicil thereto and have no interest in said estate.

Seventh.

This defendant admits the allegations contained in the seventh paragraph of the bill of complaint.

Eight-.

This defendant has no knowledge of the allegations contained in the eight- paragraph of said bill, but believes them to be correctly stated.

Ninth.

This defendant denies that said will and codicil are ambiguous and inconsistent, or that if there is any ambiguity it is patent on the face of the instrument, and therefor- resolvable by the rules of construction, but says that said will and codicil show a plain and manifest intention on the part of the testatrix to dispose of all her property, real and personal, of every nature and kind, then owned or thereafter acquired, and wherever situate, and that by said will and codicil the said testatrix carried out such intention and has thereby validly disposed of all her said estate, and that by the provisions of said will and codicil this defendant is entitled to all the residue of said estate remaining after the payment of the legacy of $5,000.00 thereby given to the Hospital of the University of Pennsylvania.

Further answering said bill of complaint, this defendant says that it may be necessary to refer this cause to the auditor to state an account for distribution, and that the complainant should be required to furnish an account in this cause, and that this defendant should be permitted to elect to accept as correct said account or to except thereto, and only in the latter event should the cause go to the auditor.

Further answering said bill of complaint, this defendant says that what expense and commission are reasonable or necessary will be acqueis-d in by this defendant, but she says that she is advised and believes, and upon such advice and belief answers, that the complainant is not entitled to an allowance for counsel fees.

And, having fully answered, this defendant pray- to be hence dismissed with her necessary costs.

EMELINE COLVILLE.

EDWIN SUTHERLAND,
Sol'r for Emeline Colville.

17 STATE OF NEW YORK, } ss:
City of New York, }

I, Emeline Colville, do solemnly swear that I am one of the defendants in the above-entitled cause; that I have read the answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

EMELINE COLVILLE.

Sworn and subscribed to before me this 14th day of January, 1896.

LOUIS F. RYAN,
[SEAL.] *Notary Public* (200), *New York County.*

Answer of Defendants Mary Spencer Noble & Pattie Belle Tilghman.

Filed January 21, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY & TRUST COMPANY, a Corporation, Trustee under the Last Will and Testament of Mary E. Ruth, Deceased,
vs.
MARY SPENCER NOBLE *et al.*
} In Equity. No. 16834.

To the honorable supreme court of the District of Columbia, holding a special term in equity:

The joint and several answer of the defendants Mary Spencer Noble, Pattie Belle Tilghman, Bradford O. Harrison, and Eleanor Susanna Willis respectfully represents:

First.

That they are citizens of the United States and resident—Mary Spencer Noble, of Baltimore, Maryland; Pattie Belle Tilghman, in Easton, Maryland; Bradford O. Harrison, in St. Louis, Missouri, and Eleanor Susanna Willis, in St. Michaels, Maryland, and that they are sued in this case in their own right as heirs-at-law of Mary E. Ruth, deceased.

Second.

That they admit that the complainant, The American Security and Trust Company, is a corporation created by an act of Congress approved October 1st, A. D. 1890, in manner as set forth in the first paragraph of the said original bill, and that the said company is under the said last will and testament of Mary E. Ruth, deceased, executor of said last will, and that letters testamentary have been issued to the said company in due form by the orphans' court of the District of Columbia.

Third.

That they admit that the said Mary E. Ruth, a resident of the District of Columbia, died on the 16th day of June, A. D. 1892, having made her last will and testament, in which she constituted the complainant her executor and gave, devised, and bequeathed to it all her estate—real, personal, and mixed—upon the trusts set forth in said will, which trusts are repeated in the second paragraph of the original bill filed herein; and these respondents admit that the said trusts declared in and by said will are properly and fully recited in the aforesaid paragraph of the original bill; that said respondents admit that the said Mary E. Ruth did in and by her codicil to said will, dated on the said 1st day of June, A. D. 1892, and duly executed, annul one of the bequests in her said will and did add by way of change thereof in said codicil the bequest made part of the said second paragraph of the said original bill.

Fourth.

Respondents admit that letters testamentary were granted unto the complainant on the 28th day of June, A. D. 1892, by the orphans' court of the District of Columbia, and that the complainant, upon the issuing of said letters, entered upon the performance of the trusts reposed in it by the said will and codicil and the said letters testamentary.

Fifth.

Respondents, further answering, say that they are not acquainted with the nature, character, or location of the property, real and personal, belonging to the said Mary E. Ruth, deceased, but that they believe that the statement thereof contained in the fourth paragraph of the said original bill is correct, and that the inventory of the personal property filed in the orphans' court and the account of the sales of real estate made or to be made by the said complainant are true, and that the money arising from such sales has been invested in the manner set forth in the said section of said bill, and *are* now held by the complainant under the trusts contained and set forth in the said will of Mary E. Ruth.

Sixth.

Respondents, in reply to the fifth, sixth, seventh, and eight- paragraphs of the original bill, say that they admit the allegations contained therein to be true, so far as they can be expected to know the truth thereof.

Seventh.

The respondents, further answering the allegations of the said bill, deny that any ambiguity or inconsistency appears upon the face of the said will and codicil, and to the contrary thereof aver that the provisions of the said will and codicil are clear and free from doubt, and that there is no reason why the estate of the said

19 Mary E. Ruth should not be distributed under the provisions of her will without the intervention of this court, but that said respondents, believing that it will be better for all parties to have any questions that may arise in the construction of said will referred to and passed upon by this honorable court, do hereby submit their rights to the said court and its jurisdiction.

And, having fully answered, the said defendants pray to be hence dismissed with their reasonable costs; and so, as in duty bound, they will ever pray, &c.

MARY SPENCER NOBLE.
PATTIE BELLE TILGHMAN.

STATE OF MARYLAND, *Talbot County,* } *To wit:*

I do solemnly swear that I have read the aforegoing answer by me subscribed and know the contents thereof; that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

PATTIE BELLE TILGHMAN.

Subscribed and sworn to before me this 9th day od January, A. D. 1896.

GEORGE E. S. LOVEDAY,
[SEAL.] *Notary Public.*

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

I do solemnly swear that I have read the aforegoing answer by me subscribed and know the contents thereof; that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

MARY SPENCER NOBLE.

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

Sworn and subscribed before me this 17 day of January, 1896.

[Seal of Felix R. Sullivan, No. 25 South Street, Baltimore, Md.]

FELIX R. SULLIVAN,
Notary Public.

20 *Answer of Bradford O. Harrison.*

Filed January 21, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY & TRUST COMPANY, a Corporation, Trustee under the Last Will and Testament of Mary E. Ruth, Deceased, *vs.* MARY SPENCER NOBLE *et al.*	In Equity.	No. 16834.

To the honorable supreme court of the District of Columbia, holding a special term in equity:

The joint and several answer of the defendants Mary Spencer Noble, Pattie Belle Tilghman, Bradford O. Harrison, and Eleanor Susanna Willis respectfully represents:

First.

That they are citizens of the United States and resident—Mary Spencer Noble, of Baltimore, Maryland; Pattie Belle Tilghman, in Easton, Maryland; Bradford O. Harrison, in St. Louis, Missouri, and Eleanor Susanna Willis, in St. Michaels, Maryland, and that they are sued in this case in their own right as heirs-at-laws of Mary E. Ruth, deceased.

Second.

That they admit that the complainant, The American Security and Trust Company, is a corporation created by an act of Congress approved October 1st, A. D. 1890, in manner as set forth in the first paragraph of the said original bill, and that the said company is, under the said last will and testament of Mary E. Ruth, deceased, executor of said last will, and that letters testamentary have been issued to the said company in due form by the orphans' court of the District of Columbia.

Third.

That they admit that the said Mary E. Ruth, a resident of the District of Columbia, died on the 16th day of June, A. D. 1892, having made her last will and testament, in which she constituted the complainant her executor and gave, devised, and bequeathed to it all her estate—real, personal, and mixed—upon the trusts set forth in said will, which trusts are repeated in the second paragraph of the original bill filed herein; and these respondents admit that the said trusts declared in and by said will are properly and fully recited in the aforesaid paragraph of the original bill; that said respondents admit that the said Mary E. Ruth did in and by her codicil to said will, dated on the said 1st day of June, A. D. 1892, and duly exe-

21 cuted, annul one of the bequests in her said will, and did add by way of change thereof in said codicil the bequest made part of the said second paragraph of the said original bill.

Fourth.

Respondents admit that letters testamentary were granted unto the complainant on the 28th day of June, A. D. 1892, by the orphans' court of the District of Columbia, and that the complainant, upon the issuing of said letters, enter- upon the performance of the trusts reposed in it by the said will and codicil and the said letters testamentary.

Fifth.

Respondents, further answering, say that they are not acquainted with the nature, character, or location of the property, real and personal, belonging to the said Mary E. Ruth, deceased, but that they believe that the statement thereof contained in the fourth paragraph of the said original bill is correct, and that the inventory of the personal property filed in the orphans' court and the account of the sales of real estate made or to be made by the said complainant are true, and that the money arising from such sales has been invested in the manner set forth in the said section of said bill and *are* now held by the complainant under the trusts contained and set forth in the said will of Mary E. Ruth.

Sixth.

Respondent-, in reply to the fifth, sixth, seventh, and eight- paragraphs of the original bill, say that they admit the allegations contained therein to be true so far as they can be expected to know the truth thereof.

Seventh.

The respondent-, further answering the allegations of the said bill, deny that any ambiguity or inconsistency appears upon the face of the said will and codicil, and to the contrary thereof aver that the provisions of the said will are clear and free from doubt, and that there is no reason why the estate of the said Mary E. Ruth should not be distributed under the provisions of her will without the intervention of this court, but that said respondents, believing that it will be better for all parties to have any questions that may arise in the construction of the said will referred to and passed upon by this honorable court, do hereby submit their rights to the said court and its jurisdiction.

And, having fully answered, the said defendants pray to be hence dismissed with their reasonable costs; and, so as in duty bound, they will ever pray, &c.

BRADFORD O. HARRISON.

WEBB & WEBB, *Sol'rs.*

The complainant hereby consents that the answer of Bradford O. Harrison in the above cause may be signed by his solicitor,

22 and it hereby further waives affidavit to said answer and consents that it may be filed in manner and form as above.

WM. A. McKENNEY,
Solicitor Amr. Sec. & Tr. Co., &c., Complainant.

Answer of Defendant Eleanor Susanna Willis.

Filed January 21, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY & TRUST COMPANY, a Corporation, Trustee under the Last Will and Testament of Mary E. Ruth, Deceased,
vs.
MARY SPENCER NOBLE *et al.*
} In Equity. No. 16834.

To the honorable supreme court of the District of Columbia, holding a special term in equity:

The joint and several answer of the defendants Mary Spencer Noble, Pattie Belle Tilghman, Bradford O. Harrison, and Eleanor Susanna Willis respectfully represents:

First.

That they are citizens of the United States and resident—Mary Spencer Noble, of Baltimore, Maryland; Pattie Belle Tilghman, in Easton, Maryland; Bradford O. Harrison, in St. Louis, Missouri, and Eleanor Susanna Willis, in St. Michaels, and that they are sued in this case in their own right as heirs-at-law of Mary E. Ruth, deceased.

Second.

That they admit that the complainant, The American Security and Trust Company, is a corporation created by an act of Congress approved October 1st, A. D. 1890, in manner as set forth in the first paragraph of the said original bill, and that the said company is under the said last will and testament of Mary E. Ruth, deceased, executor of said last will, and that letters testamentary have been issued to the said company in due form by the orphans' court of the District of Columbia.

Third.

That they admit that the said Mary E. Ruth, a resident of the District of Columbia, died on the 16th day of June, A. D. 1892, having made her last will and testament, in which she constituted the complainant her executor and gave, devised, and bequeathed to it all her estate—real, personal, and mixed—upon the trusts set forth in said will, which trusts are repeated in the second paragraph of the

23 original bill filed herein; and these respondents admit that the said trusts declared in and by said will are properly and fully recited in the aforesaid paragraph of the original bill; that said respondents admit that the said Mary E. Ruth did in and by her codicil to said will, dated on the said 1st day of June, A. D. 1892, and duly executed, annul one of the bequests in her said will, and did add by way of change thereof in said codicil the bequest made part of the said second paragraph of the said original bill.

Fourth.

Respondents admit that letters testamentary were granted unto the complainant on the 28th day of June, A. D. 1892, by the orphans' court of the District of Columbia, and that the complainant, upon the issuing of said letters, enter- upon the performance of the trusts reposed in it by the said will and codicil and the said letters testamentary.

Fifth.

Respondents, further answering, say that they are not acquainted with the nature, character, or location of the property, real and personal, belonging to the said Mary E. Ruth, deceased, but that they believe that the statement thereof contained in the fourth paragraph of the said original bill is correct, and that the inventory of the personal property filed in the orphans' court and the account of the sales of real estate made or to be made by the said complainant are true, and that the money arising from such sales has been invested in the manner set forth in the said section of said bill and *are* now held by the complainant under the trusts contained and set forth in the said will of Mary E. Ruth.

Sixth.

Respondents, in reply to the fifth, sixth, seventh, and eight- paragraphs of the original bill, say that they admit the allegations contained therein to be true so far as they can be expected to know the truth thereof.

Seventh.

The respondent-, further answering the allegations of the said bill, deny that any ambiguity or inconsistency appears upon the face of the said will and codicil, and to the contrary thereof aver that the provisions of the said will are clear and free from doubt, and that there is no reason why the estate of the said Mary E. Ruth should not be distributed under the provisions of her will without the intervention of this court, but that said respondents, believing that it will be better for all parties to have any questions that may arise in the construction of said will referred to and passed upon by this honorable court, do hereby submit their rights to the said court and its jurisdiction.

And, having fully answered, the said defendants pray to be hence

24 dismissed with their reasonable costs; and so, as in duty bound, they will ever pray, &c.

ELEANOR SUSANNA WILLIS.

DISTRICT OF COLUMBIA, *To wit:*

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

ELEANOR SUSANNA WILLIS.

Subscribed and sworn to before me this 13 day of January, A. D. 1896.

EDWIN P. SPARKS, *J. P.*

STATE OF MARYLAND, *Talbot County,* } *To wit:*

I hereby certify that Edwin P. Sparks, Esquire, before whom the annexed affidavit was made, was at the time of so doing a justice of the peace of the State of Maryland in and for Talbot county, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments, and that his signature thereto is genuine.

In testimony whereof I hereto set my hand and affix
[SEAL.] the seal of the circuit court for Talbot county this 14th day of Jan., 1896.

THOS. HUGHLETT,
Clerk Circuit Court for Talbot County.

Answer of Guardian ad Litem, F. Walter Bra-denburg, Jr.

Filed January 30, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

AMERICAN SECURITY & TRUST CO., Trustee of the Last Will and Testament of Mary E. Ruth, Deceased,
vs.
MARY SPENCER NOBLE *et al.*
} In Equity. No. 16834.

The answer of the defendants Jonathan Perry Harrison, Junior, Samuel Alexander Harrison, Lucy Bird Harrison, and Lydia Caroline Harrison, infants under the age of twenty-one years, by F. Walter Brandenburg, Jr., their guardian *ad litem*, to the bill of complaint filed in the above-entitled cause.

These defendants cannot admit any of the matters and things alleged in said bill, and, being infants of tender years, submit their rights to the protection of this court.

F. WALTER BRANDENBURG, JR.

25 DISTRICT OF COLUMBIA, *To wit:*

F. Walter Brandenburg, Jr., being duly sworn, deposes and says that the matters and facts set forth in the foregoing answer are true to the best of his knowledge, information, and belief.

F. WALTER BRANDENBURG, JR.

Subscribed and sworn to before me this 30th day of January, A. D. 1896.

[SEAL.] HENRY R. ELLIOTT,
U. S. Comm'r for the Dist. of Col.

Answer of Defendants Mary S. Noble, Pattie Tilghman, Bradford O. Harrison, and Eleanor S. Willis.

Filed January 31, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

AMERICAN SECURITY & TRUST CO., Trustee of the Last Will and Testament of Mary E. Ruth, Deceased,
vs.
MARY SPENCER NOBLE *et al.*
} In Equity. No. 16834.

To the honorable supreme court of the District of Columbia, holding a special term in equity:

The joint and several amended answer of Mary Spencer Noble, Pattie Belle Tilghman, Bradford O. Harrison, and Eleanor Susanna Willis respectfully represents:

Your petitioners hereby repeat the allegations and assertions contained in the first six paragraphs of their answers on file in the above-entitled cause and amend the seventh paragraph as follows:

Seventh.

Respondents, further answering the allegations of said bill, deny that any ambiguity or any inconsistency appears upon the face of the said will and codicil, and to the contrary thereof aver that the provisions of the said will are clear and free from doubt; and your respondents assert that while under the terms of the will of the said Mary E. Ruth in the event of the death of Sophia Yeungling Houston the whole of her said estate, with the exception of a legacy of five thousand ($5,000) dollars to the defendant The Hospital of the University of Pennsylvania, was given to the defendant The Home for Incurables, at Fordham, New York city, in the State of New York, yet the codicil to the said will revoked and annulled the said gift and bequest to the Home for Incurables, at Fordham, New York city, in the State of New York, and gave a legacy of five thousand ($5,000) dollars to the defendant Emeline Colville. Your respond-

26 ents therefore claim and maintain that under and by the terms of the said will and the codicil thereto the whole estate of the said Mary E. Ruth—real, personal, and mixed—after the payment of the two legacies of five thousand ($5,000) dollars each—one to the defendant The Hospital of the University of Pennsylvania and the other to the defendant Emeline Colville—passes to the heirs of the said Mary E. Ruth, all of whom are parties defendant in the above-entitled cause; that there is no reason why the estate of the said Mary E. Ruth should not be *disturbed* under the provisions of her said will without the intervention of this court, but the said respondents, believing that it would be better for all parties to have any questions that may arise in the construction of the said will referred to and passed upon by this honorable court, without confessing, admitting, or waiving any claim, protest, or obligation they may have herein, do hereby submit their rights to the said court and its jurisdiction.

And, having fully answered, the said defendants pray to be hence dismissed with their reasonable costs and expenses; and, so as in duty bound, they will ever pray, &c.

WEBB, WEBB & LINDSLEY,
Solicitors for Defendants.

We consent to the filing of this answer and waive affidavit thereto.

WM. A. McKENNEY,
Sol'r for Compl't.
J. S. FLANNERY,
Sol'r for Home for Incurables of N. Y.

Without waiving any right of Emeline Colville or conceding any matter of fact or of law, I consent to the filing of this answer and waive affidavit thereto.

EDWIN SUTHERLAND,
Sol'r for Colville.

Answers of R. L. Spencer, W. L. Spencer, C. C. Spencer, and E. H. Hayden.

Filed February 4, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY & TRUST CO., &c.,
vs.
MARY S. NOBLE *et al.*
} No. 16834. In Equity.

The joint and separate answers of Robert Leigh Spencer, Webster Lindsley Spencer, Catherine C. Spencer, and Emily H. Hayden to the bill of complaint of American Security and Trust Company, trustee under the last will and testament of Mary E. Ruth, deceased, filed in this honorable court against them and others.

These defendants, answering, say:

1.

That they admit the allegations contained in the first paragraph of said bill.

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2.

That they admit the allegations contained in the second paragraph of said bill.

3.

That they admit the allegations contained in the third paragraph of said bill.

4.

That they can neither admit nor deny the allegations contained in the fourth paragraph of said bill, and require strict proof of the same.

5.

That they admit the allegations contained in the fifth paragraph of said bill.

6.

That these respondents are the only children of Ann C. B. Spencer, deceased, now living or living at the time of the death of said Mary E. Ruth, and that their mother, Ann C. B. Spencer, was a half sister of said Mary E. Ruth, deceased, by the same father, but different mothers; that upon general information and common repute they believe the other allegations made in said sixth paragraph of said bill are true, but have no personal knowledge of the same.

6.

That they admit the allegations contained in the seventh paragraph of said bill.

8.

That they can neither admit nor deny the allegations contained in the eight- paragraph of said bill, and require full proof of the same.

9.

That these respondents, answering the ninth paragraph of said bill, deny that there is any ambiguity in said will and codicil, and respectfully submit that under the established rules of construction the said will and codicil plainly say, and must therefore be interpreted to mean,—

That for the purposes of the trust therein created the entire estate was by said will converted into personal property, and, as these respondents admit, it was in fact so actually converted into personal property and invested by said trustee.

That they further contend and allege that the said Sophia Yingling Houston was properly the equitable life tenant of said estate, the prior contingency for the termination of said equitable estate in her, as mentioned in said will, not in fact having arisen.

That upon the death of said Sophia Yingling Huston, under said

28 will $5,000 was and still is, these respondents are informed, due and payable to Hospital of the University of Pennsylvania.

That under the said codicil the bequest in the wall to the Home for Incurables, at Fordham, New York, was and is explicitly and absolutely annulled.

That by said codicil the further sum of $5,000 was bequeathed to Emiline Colville, and to that sum, and to that only, is she now entitled.

That as to the remainder of said estate, after the expiration of the equitable life interest and the payment of the said two legacies of $5,000 each, the said Mary E. Ruth, deceased, is intestate, and the said residue of her estate belongs to her heirs-at-law and next of kin, or to the heirs-at-law and next of kin of the said Sarah Yingling Huston, grand-daughter of said Mary E. Ruth, who was living at the time of death of said Mary E. Ruth.

That the living heirs-at-law and next of kin of Mary E. Ruth and the heirs-at-law and next of kin of Sophia Yingling Huston are in both cases the same parties—that is to say, the children of the four brothers and sisters of said Mary E. Ruth, deceased, as set forth in said bill of complaint.

That the said residue of said estate does, in any aspect of the case, belong to and should be distributed to the children of said deceased brothers and sisters of said Mary E. Ruth, and these respondents therefore claim each of them one-fourth of said residue.

That these respondents join in the prayer that the papers in this cause be referred to the auditor to state an account for distribution.

And, having fully answered said bill, these respondents pray to be hence dismissed with their reasonable costs.

And, as in duty bound, &c.

ROBERT LEIGH SPENCER.
WEBSTER LINDSLEY SPENCER.
KATHERINE C. SPENCER.
EMILY H. HAYDEN.

Witness:

CHAS. S. HAYDEN.

Feb. 3, 1896.

CHARLES S. HAYDEN,
Solicitor for These Respondents.

29 *Replication.*

Filed March 3, 1896.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, Trustee, etc., of Mary E. Ruth, Deceased, Complainant,
vs.
MARY SPENCER NOBLE *et als.*, Defendants. } In Equity. No. 16834.

Replication.

The plaintiff joins issue on the answers of the defendants and each and every of them.

WM. A. McKENNEY,
Solicitor for Complainants.

Decree.

Filed June 25, 1896.

Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY
v.
MARY SPENCER NOBLE & Others. } In Equity. No. 16834, Docket No. 39.

This cause having been argued and submitted upon the pleadings and having been duly considered—

It is by the court, this 25th day of June, A. D. 1890, ordered, adjudged, and decreed that the legal effect of the codicil executed by the testatrix, Mary Eleanor Ruth, on the 1st day of June, 1892, to her will of the same date, as shown in the proceedings, was to revoke the legacy of five thousand dollars given in and by said will to the Hospital of the University of Pennsylvania and to substitute Mrs. Emeline Colville as the legatee of said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvania, but not to revoke the residuary bequest in said will contained in favor of the "Home for Incurables," at Fordham, in New York city.

It is further ordered that this cause be referred to the auditor to state an account of the estate of said Mary Eleanor Ruth, for which the complainant is accountable, for distribution according to the aforegoing construction of the said will and codicil, making all proper allowance to the complainant for its necessary expenses in connection with said estate, the costs incurred in this cause, including counsel fees, and a reasonable compensation for its services as trustee.

W. S. COX, *J.*

1896, July 2.—Appeal by Emeline Colville, defendant.

In the Supreme Court of the District of Columbia.

AMERICAN SECURITY AND TRUST COMPANY, Trustee, &c., *vs.* MARY SPENCER NOBLE *et al.* } No. 16834. In Equity.

The President of the United States to American Security and Trust Company, trustee, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal noted in the supreme court of the District of Columbia on the 2nd day of July, 1896, wherein Emeline Colville is appellant and you are appellee, to show cause, if any there be, why the judgment *decree* rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 6th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 7 day of July, 1896.

WM. A. McKENNEY,
Attorney for Appellee.

Memorandum.

1896, July 8.—Appeal by defendant Hospital of Pennsylvania.

Order Allowing $50.00 *in Lieu of Bond to Secure Costs of an Appeal.*

Filed July 9, 1896.

In the Supreme Court of the District of Columbia.

AMERICAN SECURITY AND TRUST CO. *vs.* MARY S. NOBLE *et al.* } Equity. No. 16834.

It is this 9th day of July, 1896, ordered that the defendants in the above-entitled case be allowed to deposit fifty ($50.00) dollars in lieu of giving bond to secure the costs of an appeal to the Court of Appeals.

CHAS. C. COLE,
Asso. Justice.

31 *Appeal by Robert Leigh Spencer et al.*

Filed July 10, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

AMERICAN SECURITY & TRUST CO.
vs.
MARY SPENCER NOBLE *et al.*
} In Equity. No. 16834.

The clerk will please note an appeal from a decree rendered in the above-entitled cause on the 25th day of June, 1896, on behalf of the defendants Robert Leight Spencer, Webster Lindsley Spencer, Katherine C. Spencer, and Emily H. Hayden, and issue citation to the appellees, the complainant, and defendant No. 14.

CHARLES S. HAYDEN,
Solicitors for Defendants.

Appeal by Mary Spencer Noble.

Filed July 10, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

AMERICAN SECURITY & TRUST CO.
vs.
MARY SPENCER NOBLE *et al.*
} In Equity. No. 16834.

The clerk will please note an appeal from the decree rendered in the above-entitled cause on the 25th day of June, 1896, on behalf of the defendants Mary Spencer Noble, Pattie Belle Tilghman, Eleanor Susanna Willis, and Bradford O. Harrison and on behalf of the infant defendants herein, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, and Lydia Caroline Harrison, through F. Walter Brandenburg, Jr., their guardian *ad litem*, and issue citation to the appellees, the complainant, and defendant No. 14.

WEBB, WEBB & LINDSLEY,
Solicitors for Defendants.

Refusal of Defendant Home for Incurables to Join in Appeal.

Filed July 10, 1896.

In the Supreme Court of the District of Columbia.

AMERICAN SECURITY & TRUST CO.
vs.
MARY S. NOBLE *et al.*
} Equity. No. 16834.

The defendant The Home for Incurables, at Fordham, New York, being satisfied with the decree passed in the above-entitled cause on

32 the 25th of June, 1896, refuses to join in any appeal from said decree.

J. S. FLANNERY,
Sol'r for Home for Incurables of N. Y.

In the Supreme Court of the District of Columbia.

THE AMERICAN SECURITY AND TRUST COMPANY (a Corporation)
vs.
MARY SPENCER NOBLE *et al.*
} No. 16834. In Equity.

The President of the United States to The American Security and Trust Company, a corporation, and The Home for Incurables, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in supreme court of the District of Columbia on the 10th day of July, 1896, wherein Mary Spencer Noble, Pattie Belle Tilghman, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia Caroline Harrison, Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer, Emily H. Hayden, and The Hospital of the University of Pennsylvania are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 10th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 11th day of July, 1896.

J. S. FLANNERY,
Attorney for Appellee The Home for Incurables.
WM. A. McKENNEY,
Att'y for Appellee The Am. Security & Tr. Co.

Memorandum.

1896, July 14.—$50 deposited by appellants in lieu of bond for appeal.

33 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 97, inclusive, to be true copies of originals in cause No. 16834, in equity, wherein The American Security and Trust Company, a corporation, trustee under the last will and testament of Mary E. Ruth, deceased, is complainant and Mary Spencer Noble *et al.* are defendants, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19th day of August, A. D. 1896.

J. R. YOUNG, *Clerk,*
By L. P. WILLIAMS, *Ass't Clerk.*

In the Court of Appeals of the District of Columbia.

EMELINE COLVILLE
vs.
AMERICAN SECURITY AND TRUST COMPANY. } No. 614.

MARY SPENCER NOBLE *et al.*
vs.
AMERICAN SECURITY AND TRUST COMPANY *et al.* } No. 615.

Now comes the appellant The Hospital of the University of Pennsylvania and represents that errors from which it prosecutes its appeal in the above-entitled causes are that the court in its decree below interprets the will of Mary E. Ruth, deceased, and a codicil thereto so that the legacy in the said will to the Hospital of the University of Pennsylvania is by the codicil of said will revoked, and this appellant says that the said interpretation is error and the parts of the record filed in the clerk's office of the Court of Appeals in the above-entitled causes which it thinks necessary for consideration of the questions involved and which *it is* necessary to be printed in the above-entitled causes are the following:

The index and the entitling pages, one (1) to eighteen (18), inclusive, of the transcript of record filed in the said clerk's office of the Court of Appeals and pages fifty-nine (59) to ninety-seven (97), inclusive, of the said transcript of record.

And this appellant deems that in order to properly present the case before the Court of Appeals that it is necessary that the said parts of the said transcript of the record be printed and those parts only.

HENRY WISE GARNETT,
Solicitor for Appellant The Hospital of the University of Pennsylvania.

34 We hereby consent and agree that the parts of the record mentioned in the above notice may constitute the record to be printed in the Court of Appeals in the above-entitled causes.

WEBB, WEBB & LINDSLEY,
CHARLES S. HAYDEN,
J. S. FLANNERY,
Sol'r- for Home for Incurables of New York.
WM. A. McKENNEY,
Sol'r for American Security & Trust Co.
EDWIN SUTHERLAND,
Sol'r for Emeline Colville.

Endorsed: Court of Appeals, D. C., October term, 1896. Nos. 614 & 615. Emeline Colville, appellant, *vs.* American Security & Trust Co., and Mary Spencer Noble *et al.*, appellants, *vs.* American Security & Trust Co. *et al.* Assignment of errors by The Hospital of the University of Pa. & stipulation as to printing record. Court of Appeals, District of Columbia. Filed Sep. 9, 1896. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 614. Emeline Colville, appellant, *vs.* American Security and Trust Company, trustee, and, 615, Mary Spencer Noble *et al.*, appellants, *vs.* The American Security and Trust Company, a corporation, *et al.* Court of Appeals, District of Columbia. Filed Aug. 22, 1896. Robert Willett, clerk.

35 TUESDAY, *November 3d, A. D.* 1896.

EMELINE COLVILLE, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Trustee, } No. 614.

and

MARY SPENCER NOBLE *et al.*, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, and THE HOME FOR INCURABLES. } No. 615.

Upon motion of Mr. Edwin Sutherland, of counsel for Emeline Colville, it is by the court ordered that the above-entitled causes be assigned for hearing Friday, November 6th, 1896.

THURSDAY, *December 3d, A. D.* 1896.

EMELINE COLVILLE, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Trustee, } No. 614.

and

MARY SPENCER NOBLE *et al.*, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, *et al.* } No. 615.

The above-entitled causes are reassigned for hearing on Tuesday, December 8th, 1896.

36 TUESDAY, *December 8th, A. D.* 1896.

EMELINE COLVILLE, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Trustee, } No. 614.

and

MARY SPENCER NOBLE, PATTIE BELLE TILGHMAN, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia Caroline Harrison, Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer, Emily H. Hayden, and The Hospital of the University of Pennsylvania, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, and THE HOME FOR INCURABLES. } No. 615.

The argument in the above-entitled causes was commenced by Mr. Corcoran Thom, attorney for the Hospital of the University of Pennsylvania, and was continued by Mr. H. R. Webb, attorney for the heirs-at-law, and by Mr. George H. Yeaman, attorney for the appellee The Home for Incurables, and by Mr. Edwin Sutherland, attorney for the appellant Emeline Colville.

37 WEDNESDAY, *December 9th, A. D.* 1896.

EMELINE COLVILLE, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Trustee, } No. 614.

and

MARY SPENCER NOBLE, PATTIE BELLE TILGHMAN, JONATHAN PERRY HARRISON, JR., SAMUEL ALEXANDER HARRISON, LUCY BIRD HARRISON, BRADFORD O. HARRISON, LYDIA CAROLINE HARRISON, ELEANOR SUSANNA WILLIS, ROBERT LEIGH SPENCER, WEBSTER LINDSLEY SPENCER, KATHARINE C. SPENCER, EMILY H. HAYDEN, and THE HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, and THE HOME FOR INCURABLES. } No. 615.

The argument in the above-entitled causes was continued by Mr. Edwin Sutherland, attorney for the appellant Emeline Colville, and was concluded by Mr. John Sidney Webb, attorney for the heirs-at-law.

38 EMELINE COLVILLE, Appellant,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, Trustee. } No. 614.

MARY SPENCER NOBLE and Others, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY and Another. } No. 615.

Mr. Justice MORRIS delivered the opinion of the court:

These are cross-appeals by different defendants in a suit instituted on the equity side of the supreme court of the District of Columbia by the appellee The American Security and Trust Company, as trustee, for the purpose of procuring a judicial construction of the last will and testament of Mrs. Mary Eleanor Ruth, who died in the city of Washington on June 16, 1892.

The will in question, or rather the will and codicil to it, both executed on the same day, June 1, 1892—and it is the codicil rather than the will that gives rise to the difficulty sought to be solved in the present proceedings—are as follows:

"I, Mary Eleanor Ruth, residing in the city of Washington and the District of Columbia, being of sound and disposing mind and memory, do make and publish and declare this to be my last will and testament, hereby revoking and making null and void any and all former wills and codicils by me at any time made.

"First—I direct my executor hereinafter named to first pay out of my estate my funeral expenses and all just debts.

"Second.—I give, devise and bequeath all of my estate, real, per-

sonal, or mixed, whether in possession, reversion or remainder, now acquired or hereafter to be acquired and wheresoever situ-
39 ated, to the American Security and Trust Company of Washington city, District of Columbia, its successors and assigns, in trust nevertheless for the following uses and purposes only; that is to say—

"To invest and reinvest the proceeds of my said estate in its discretion from time to time * * * . (Here follow directions in regard to the investment of the property and a provision for the application of the whole and entire income to the use of the grand-daughter of the testatrix for the term of her natural life, which, as the grand-daughter is now dead and the purpose of the provision has ceased, may be omitted.)

"Third.—In the event of the death of my said grand-daughter Sophia Yuengling Huston, or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the 'American Security and Trust Company' shall cease and be determined, and so much of my said estate shall thereupon be conveyed and delivered over by said American Security and Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital, in the city of Philadelphia, said bed to be in the name and memory of my beloved son Melancthon Love Ruth.

"All the rest and residue of my said estate of whatever kind, after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the 'Home for Incurables' at Fordham, New York city, in the State of New York, its successors and assigns forever, to be used by said 'Home for Incurables' to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Melancthon Love Ruth.

"Fourth—(Appoints guardians for her grand-daughter.)

"Fifth—I hereby nominate and appoint the 'American Security and Trust Company,' of Washington city, District of Columbia, to be the sole executor of my estate.

"In evidence whereof I have hereunto set my hand this first day of June in the year of our Lord eighteen hundred and ninety-two.

"(Signed) MARY E. RUTH."

40 (*Codicil.*)

"I, Mary Eleanor Ruth being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament—I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the State of New York; and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville now living in New York city, said bequest

being on account of her kindness to my son and myself during his and my illness and my distress.

"In witness whereof I have hereto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two; and in all other things ratify and affirm my said will.

"MARY E. RUTH."

Both the will and the codicil were attested on the same day by the same three witnesses, of whom two at least were members of the bar, and one of these two, it seems to be conceded, was the scribe of both documents, which in their use of legal phraseoly plainly manifest the presence of professional knowledge in their preparation. The testatrix died two weeks after their execution.

The American Security and Trust Company assumed the executorship of the will, and upon the termination of the executorship it took the property as trustee. On April 4, 1895, by the death on that day of the grand-daughter of the testatrix, the trust vested in the company by the will was determined and ceased; and then, a question having arisen as to the proper construction of the codicil, the trust company instituted the present suit for the judicial ascertainment of the proper persons to whom it should make distribution of the property in its hands, at that time amounting to about thirty thousand dollars.

The next of kin of the deceased testatrix, the Hospital of the University of Pennsylvania, the Home for Incurables at Fordham, in the city of New York, and Emeline Colville were made defendants to the bill, and they all filed their answers, setting up
41 their respective claims. The Hospital of the University of Pennsylvania claimed to be entitled to the legacy of five thousand dollars left to it in the will, and maintained that there was nothing in the codicil that would in any manner affect the bequest. The Home for Incurables claimed in its answer to be entitled to the rest and residue of the estate of the deceased testatrix, as provided in the original will, and that the devise and bequest there made were not revoked by the codicil, or were revoked only, if at all, to the extent of five thousand dollars. Mrs. Emeline Colville claimed to be entitled to the whole of the rest and residue of the estate after the payment of the legacy to the Hospital of the University of Pennsylvania, and not merely to the sum of five thousand dollars specifically mentioned as the amount of the legacy to her. The heirs-at-law and next of kin claimed that the residue of the estate after the payment of the two legacies of five thousand dollars each, one to the Hospital of the University of Pennsylvania and the other to Mrs. Emeline Colville, vested in them by operation of law and in pursuance of the statute of distribution of decedents' estates as in case of intestacy.

There was no testimony taken. Counsel were all of opinion that, inasmuch as the mistake in the codicil, whatever it was, was a patent one, no testimony was admissible to aid in the solution of the difficulty. So the cause went to hearing in the court below upon the bill and answers, and that court thereupon rendered a

decree, wherein it was held that the legal effect of the codicil was to revoke the legacy of five thousand dollars previously given in the will to the Hospital of the University of Pennsylvania and to substitute Mrs. Emeline Colville as the legatee of said sum in the place and stead of said hospital, but not to revoke the bequest of the rest and residue of the estate to the Home for Incurables at Fordham.

From this decree the Hospital of the University of Pennsylvania, Mrs. Colville, and the nest of kin have all appealed.

1. With reference to the appeal of Mrs. Emeline Colville, we are entirely satisfied that there would be no justification whatever for any construction of the will and codicil of the deceased testa-
42 trix that would enlarge her legacy beyond the sum of five thousand dollars specifically bequeathed to her in the codicil. If it was the intention of the testatrix to substitute Mrs. Colville as the residuary legatee of the estate in the place and stead of the "Home for Incurables," which is the claim made on her behalf, the rule or maxim so frequently applied in such cases, *voluit sed non dixit*—she wished it, but she did not say so—is entirely pertinent. Nowhere, either in the will or codicil, is there the slightest manifestation of intention on the part of the testatrix to give more than five thousand dollars to Mrs. Colville. Indeed, the argument would be rather plausible that the legacy left to Mrs. Colville was a specific legacy assumed to have been previously left to some one else, and that, inasmuch as there was in fact no such previous specific legacy, therefore she would have nothing; but it is clear to us that it was the intention of the testatrix that Mrs. Colville should have five thousand dollars out of her estate, and that under no proper construction of the will and codicil could she be held entitled to any more.

The theory upon which it is sought to support her claim to be substituted for the Home for Incurables as the legatee of the rest and residue of the estate is that otherwise the testatrix would have died intestate as to a large part of her estate, and the very undertaking of a person to make a will creates a strong presumption of a purpose to dispose of the whole estate. Undoubtedly the theory is correct that the undertaking of a person to make a will creates a presumption of purpose on the part of that person to dispose of his whole estate; but the theory is just as valueless in the present connection as is the theory with which on behalf of the heirs-at-law and next of kin it is sought to antagonize it, namely, that the heirs-at-law are not to be disseised without specific words to that effect, and that every intendment is to be made in their favor—a theory greatly more regarded than the other by the authorities. There are many cases in which the execution of a will is entirely consistent with a purpose of partial intestacy; but, even assuming an express and unmistakable purpose to dispose of one's whole estate, such purpose is vain unless there is an effort to carry it into effect
43 in accordance with law. If one expressly stating in his will that he therein desires to dispose of his whole and entire estate, and, possessing three pieces of property, devises one to A and another to B, but is entirely silent as to the third, and there is no

residuary clause that could convey it, it would be idle to argue that such third piece would pass by the will. The theory is properly invoked, not to authorize the courts to make wills for parties or to supply presumed deficiencies in their wills, which they have no right to do, but to aid a testator's imperfect expression of his purpose. If there are two or more possible constructions of the terms of a will or of the terms of a devise or bequest in a will, it is proper that the courts should adopt that construction, if otherwise reasonable, which would make the testator die testate rather than intestate (*Given vs. Hilton*, 95 U. S., 391; *Smith vs. Bell*, 6 Pet., 68; *Hardenburg vs. Ray*, 101 U. S., 112). This is the extent of the doctrine, and it would be a perversion, not an application, of it to use it for the purpose of supplying clauses or expressions in a will which the testator may have intended to use, but which, as matter of fact, he did not use, and which there is nothing in the will itself to show that he intended to use, for conjecture cannot be permitted to supply the expression of intention.

In the documents before us there is nothing whatever to show any purpose on the part of the testatrix to devise and bequeath the rest and residue of her estate to Mrs. Colville. The bequest to Mrs. Colville was evidently an afterthought, anyhow. It did not enter into the consideration of the testatrix when she was making the will itself. It was no part of any general testamentary scheme or purpose. The idea that it was the intention of the testatrix to make Mrs. Colville her residuary devisee and legatee is one that is not suggested by anything that is found either in the will or codicil, but is the result of the fact that otherwise the testatrix would have died partially intestate; but courts are not allowed to interpolate provisions in a will merely for the purpose of preventing intestacy, either whole or partial.

We are of opinion that, whatever may be the merits of the
44 controversy as between the others who claim to be interested, Mrs. Emeline Colville is entitled only to the sum of five thousand dollars.

2. A more difficult question is presented as between the claims of the Home for Incurables, the Pennsylvania Hospital, and the next of kin. By the decree of the court below the latter are excluded, Mrs. Colville is substituted for the Pennsylvania Hospital, and the Home for Incurables remains entitled to the rest and residue of the estate, as provided in the original will. The construction of the codicil, by which this conclusion is reached, has undoubtedly the merit of interfering least with the scheme of the original will and of insuring entire testacy on the part of the testatrix, and we are not sure that this is not what the testatrix intended. But our difficulty is that in order to reach this construction we must indulge in conjecture which has no foundation in the will and must nullify the express provisions of the codicil. We must hold that when the testatrix in express and specific words revoked and annulled the bequest made in the will to the Home for Incurables at Fordham, New York city, in the State of New York, she meant and intended to revoke and annul another entirely distinct and different be-

quest, one to the Hospital of the University of Pennsylvania, and we must hold that when immediately afterwards in the codicil she took occasion to refer again to the institution whose legacy she revoked she spoke of it again as "said Home for Incurables." Now this seems to us not to be construction of the will and codicil, but rather an attempt to supply its deficiencies and practically to make a will for the testatrix.

It is well-settled law that, however clearly it may be shown by testimony beyond all question that when a testator has said one thing he meant another and a different thing, the courts have no right to attempt to rectify the mistake. Such assumption of authority would be a most dangerous power for them to exercise. This would seem to be the unanimous doctrine of all the authorities, and those which seem to be exceptions to the rule are not in fact exceptions. The most prominent of these latter, perhaps, is the case of *Patch vs. White*, 117 U. S., 210.

In that case a testator had devised lot 6, in square 403,
45 with the improvements upon it, when he never owned that lot and the lot had no improvements upon it and when he did own lot 3, in square 406, which did have improvements upon it, and when the scheme of his will required that effect should be given to this devise and no effect could be given to it except by transfer of the figures, as stated, in accordance with the demonstration of the oral testimony in the case, the court held that here was a case of latent, not of patent ambiguity, and it said:

"It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift or a thing as the subject of it and there are two persons or things that answer such name or description, or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended or the thing does not belong to the testator (1 Jarman on Wills, 370; Hawkins on Wills, 9, 10). Where it consists of a misdescription, as before stated, if the misdescription can be struck out and enough remain in the will to identify the person or thing, the court will deal with it in that way, or if it is an obvious mistake will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate and the circumstances by which he was surrounded at the time of making his will (1 Jarman on Wills, 364, 365; 1 Roper on Legacies, 297, 4th ed.; 2 Williams on Executors, 988, 1032). Mr. Williams, afterwards Mr. Justice Williams, says:

'Where the name or description of a legatee is erroneous and there is no reasonable doubt as to the person who was intended to be named or described the mistake shall not disappoint the bequest. The error may be rectified, 1st, by the context of the will; 2d, to a

certain extent, by parol evidence. A court may inquire into every material fact relating to the person who claims to be interested under the will and to the circumstances of the testator and of his family and affairs for the purpose of enabling the court to identify the person intended by the testator' (pp. 988, 989). Again, he says, on page 1032: 'Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift and evidence of extrinsic circumstances taken together. The error of the testator, says Swinburne, in the proper name of the thing bequeathed doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain.'"

This case of *Patch vs. White*, as will be perceived, was one of latent and not of patent ambiguity, as the present case is conceded to be, and might, therefore, be regarded as wholly inapplicable; but we have quoted from it to show the limits within which ambiguity may be removed or mistake rectified in the construction of wills, and we find from the doctrine of that case that we have no means of rectifying the palpable mistake that was committed in the present instance.

In the codicil before us we find two distinct and practically independent testamentary dispositions: First, we have a revocation and annulment in positive and unmistakable terms of a bequest in the will to the Home for Incurables at Fordham, New York city, in the State of New York; and, secondly, we have a bequest of five thousand dollars to Mrs. Emeline Colville, of the city of New York. Coupled with this latter provision are the terms which cause all the difficulty in the case. The expression is, "I give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville," &c. Now, there was no such sum of five thousand dollars bequeathed in the will to the Home for Incurables. There was such a sum bequeathed to the Hospital of the University of Pennsylvania, while to the Home for Incurables there was a devise and bequest of all the rest and residue of the estate.

It matters not now to inquire whether the mistake was that of the testatrix herself or of the scribe of the will, nor does it matter that the latter appears in these proceedings advocating the claims of the Hospital of the University of Pennsylvania. What is of consequence is to determine whether we can rectify a mistake which is palpable and how it may be rectified.

The first of the two testamentary dispositions of the codicil, if standing alone, would present no difficulty. It is clear, precise, explicit, and unmistakable, with no element of ambiguity, either latent or patent. It nullifies in positive terms a bequest made in the will, and it is of no consequence that it purports only to revoke and annul a bequest when the will purports to devise realty as well as to bequeath personal property, for the will directs the trustee to convert the real estate into personalty, which was actually done, and all that the Home for Incurables should take would be personalty. Such a revocation could no more be defeated by proof of mistake of the

donee than could a legacy in the will by similar proof. It would not be competent for parties to show, for instance, that the legacy of five thousand dollars was intended for the Home for Incurables, while the Hospital of the University of Pennsylvania was intended to be the residuary legatee; and so, when the codicil revoked the one legacy, it is not competent for parties to show by extraneous evidence that it was the other legacy that was intended to be revoked. If language is capable of meaning, the terms of this first provision of the codicil are beyond all question, and they should be taken to mean precisely what they import—a revocation of the bequest made in the will of the rest and residue of the estate to the Home for Incurables at Fordham, in the city of New York.

And with respect to the second of these two testamentary dispositions it is equally clear and beyond all question that there was a sum of five thousand dollars intended to be left to Mrs. Emeline Colville. In accordance with the doctrine in the case of *Patch vs. White*, which is the doctrine of reason, that intention should not be defeated upon the ground that the testatrix erroneously stated that this sum had been left in the will to the Home for Incurables; the rule of *mala descriptio non nocet* to which effect is sought to be given in the case of *Patch vs. White* is equally applicable here as
48 there, and we believe that no one claims that Mrs. Colville should be deprived of her legacy of five thousand dollars by reason of this erroneous statement made in connection with it.

So that here we have two distinct testamentary dispositions, having in their terms no necessary connection with each other, from the first of which, when considered alone, all suspicion even of ambiguity is absent, and to the second of which full force and effect may be given by the disregard of a recital or collateral statement not at all necessary to the validity of the bequest and without which the bequest would be equally or even more effective; and we are asked, by the combination of the two dispositions, by the connection of the recital in the second disposition with the prior unequivocal disposition, and by the fact that no legacy of five thousand dollars had been left to any one but the Hospital of the University of Pennsylvania, therefore to hold that it was this legacy, and none other, that was intended to be revoked. This may have been the intention of the testa-rix, but it is mere conjecture. Other conjectures are equally available, as, for instance, that it was her intention to revoke both of the bequests in the will—to revoke absolutely the residuary bequest to the Home for Incurables and to substitute Mrs. Colville as the beneficiary of the other bequest in the place of the Hospital of the University of Pennsylvania; but when we once embark on the boundless sea of conjecture we infringe upon the inexorable rule that courts must not make wills for parties, and are confined merely to the work of construction of the wills that are brought before them.

We give effect to each and every provision of the codicil and to the will as an entirety by rejecting as surplusage the erroneous recital in the second clause of the codicil, which is no more than a recital and not essential to the integrity of the instrument as a tes-

tamentary disposition. If thereby it results that the testatrix died intestate as to the rest and residue of her estate, that is no more than would result in any case where a testator, intending to dispose of his estate, has failed to use apt terms for the purpose, or has not otherwise complied with the requirements prescribed by law
49 to effect his purpose. And if this conclusion also fails to give effect to the real intention of the testatrix, whatever that may have been, we can only say again that the testatrix has failed so to comply with the requirements of law as to enable the courts to give effect to her intention. It would be difficult in any view that we might take of this case to find any controlling purpose or guiding intention on the part of the testatrix, inasmuch as the fact that before the ink was dry with which her original will was written she radically changed her mind in regard to the disposition of her property is sufficient to raise a doubt whether she had in fact any well-defined purpose in regard to such disposition, and were we to indulge in conjecture we would feel no assurance in any conjecture that we might adopt that we had found the true intent and purpose of the testatrix. We deem it most proper, therefore, to indulge in no conjecture; to take the words of the will and codicil as they stand, and only to reject as unnecessary one phrase, which is in fact unnecessary to the integrity of the will and codicil.

Entertaining these views, we must hold there was error in the decision of the court below, and that it is the true legal intent and meaning of the will and codicil that the bequest of five thousand dollars to the Hospital of the University of Pennsylvania remains intact and unaffected by the codicil; that the bequest of the rest and residue of the estate to the Home for Incurables at Fordham, in the city of New York, was and is revoked by the codicil; that out of this rest and residue there is bequeathed to Mrs. Emeline Colville the sum of five thousand dollars, and that the remainder of the estate is distributable to the next of kin in accordance with the provisions of the statute of distributions.

The cause will be remanded to the Supreme Court of the District of Columbia with directions to vacate its decree heretofore rendered therein, and to enter a decree in accordance with this opinion, and for such further proceedings, if any, as may be just and proper in the premises; the cost of this appeal to be paid out of the fund. And it is so ordered.

50 *Dissenting Opinion by Mr. Chief Justice Alvey.*

It is always with diffidence and regret that I feel myself constrained to dissent from the opinion of my brothers, but in this case I cannot do otherwise, in justice to a settled conviction, than dissent from the construction adopted by them of the will and codicil of the late Mrs. Ruth. I had a very decided opinion at the hearing that the decree of the court below ought to be affirmed, and further reflection has not changed that opinion, but has strongly confirmed me in the conviction of its correctness. I shall not undertake by any extended argument to support my opinion, but shall briefly

state the grounds upon which that opinion is founded. To do this it is necessary to refer to the terms and provisions of both will and codicil.

The testatrix had an estate consisting of both real and personal property, amounting to something more than $30,000, and which she, by her will dated the 1st day of June, 1892, effectually devised and bequeathed in terms that admitted of no doubt or question. The will furnishes intrinsic evidence of a matured scheme of disposition. She devised and bequeathed her entire estate in trust for a limited time to serve a particular purpose; that was to raise an income to be applied to the support and maintenance of her granddaughter for and during the life of the latter. The grand-daughter died about three years after the death of the testatrix. After the purposes of the trust were served she then provided that there should be delivered by the trustee to the Hospital of the University of Pennsylvania the sum of $5,000, which sum "to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Melancthon Love Ruth." She then provided by the will that—

"All the residue and remainder of my said estate of whatever kind, after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the 'Home for Incurables,' at Fordham, New York city, in the State of New York, its successors and assigns, forever, to be used by said 'Home for Incurables' to endow and forever
51 maintain one or more beds in said home in *in* the name and memory of my beloved son Melancthon Love Ruth."

On the same day of the making of this will, and it may have been immediately thereafter, the testatrix added a codicil, not, as it would appear, to change the whole scheme of her will in respect to the entire residue of her estate, but in respect to the pecuniary legacy of a defined amount that had been disposed of in her will and which she found necessary to recall to enable her to bestow a bounty upon a friend in recognition of kindness that she had received. By this brief codicil she declared: "I hereby revoke and annul *the bequest* therein (referring to her will) made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeast *the* five thousand dollars (heretofore in my will bequeathed to said Home for Incurables), to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness, and my distress."

It is conceded upon all sides that it was not the intention of Mrs. Ruth to die intestate as to any portion of her estate, and no construction should be adopted that will produce intestacy as to any part of the estate if such construction can be avoided. That there was a mistake made by the draftsman of this codicil is conceded by all concerned, and the question is, How is that mistake to effect the will? In the first place, there was no pecuniary legacy given as

such by the will to the Home for Incurables, and it is conceded that it was not intended to give to Mrs. Colville more than the $5,000 mentioned. There was, as we have seen, a pecuniary legacy of $5,000 given by the will to the Hospital of the University of Pennsylvania, and if we conclude that the draftsman of this codicil, by momentary inadvertence, confounded the name of one institution with the other and inserted the name and description of the Home of Incurables instead of the Hospital of the University all the difficulty is removed. It is very clear, to my mind at least, that the legacy given by the will to the University Hospital was the legacy that was intended to be revoked in order that a legacy of the same amount might be given to Mrs. Colville. It cannot be supposed that within the short time that had intervened between the execution of the will and the
52 making of the codicil that the testatrix had determined to destroy the whole scheme of her will with respect to the bulk of her estate, consisting of both real and personal property, for the purpose simply of raising a pecuniary legacy of $5,000. If the legacy of $5,000 to Mrs. Colville had been intended to be paid out of the residue of the estate, it would not have been necessary or proper to revoke the whole residuary devise and bequest made by the will, but the proper mode of making such pecuniary bequest in the codicil would have been simply to direct the amount to be paid out of the residue. In disposing of the residue of her estate the testatrix used apt and appropriate legal terms to transfer both real and personal property, of which the residue was composed, but in the revocation in the codicil the terms employed have reference to a particular pecuniary legacy only that had been bequeathed by the will. The codicil should be read in subordination to the general scheme and plan of the will, unless the terms employed be so plain and unmistakable that no doubt whatever could exist as to the real intention of the testatrix. Here it is admitted, in the opinion of the majority of the court, that grave doubt does exist, and in such case it is better and, indeed, it is the necessary legal consequence that the codicil should fail of effect rather than the intention of the testatrix in respect of the principal part of her estate should be defeated, and if the conceded mistake in the codicil cannot be overcome and corrected by construction, as I think it can, then I should say that the codicil should fall rather than the will be defeated and the testatrix be made to die intestate as to the larger portion of her estate. The testatrix, after the payment of the $5,000 legacy to the Hospital of the University, devoted the entire residue of her estate to aid in the support of a most humane and worthy charity, and I cannot believe for a moment, upon any fair construction of the will and codicil, that it was the intention of the testatrix to revoke that residuary devise and bequest in order to raise the $5,000 for Mrs. Colville. The terms of revocation employed in the codicil, according to my understanding and construction of them, relate simply and exclusively to the pecuniary
53 legacy of $5,000 given by the will to the University Hospital,

and that Mrs. Colville was intended to be substituted to that legacy and to no other part of the estate.

In my opinion the decree appealed from ought to be affirmed.

54 MONDAY, *January 4th, A. D.* 1897.

EMELINE COLVILLE, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Trustee,
} No. 614.

and

MARY SPENCER NOBLE, PATTIE BELLE TILGHMAN, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia Caroline Harrison, Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharene C. Spencer, Emily H. Hayden, and The Hospital of the University of Pennsylvania, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, and The Home for Incurables.
} No. 615. January Term, 1897.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia on separate appeals and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that this cause be, and the same is hereby, remanded to the supreme court of the District of Columbia, with directions to vacate its decree heretofore entered therein and to enter a decree in conformity with the opinion of this court and for such further proceedings, if any, as may be just and proper in the premises, the costs in this court to be paid out of the fund.

Per MR. JUSTICE MORRIS.

January 4,1897.

Dissenting, Mr. Chief Justice Alvey.

55 MONDAY, *January 11th, A. D.* 1897.

MARY SPENCER NOBLE, PATTIE BELLE TILGHMAN, JONATHAN PERRY HARRISON, JR., SAMUEL ALEXANDER HARRISON, LUCY BIRD HARRISON, BRADFORD O. HARRISON, LYDIA CAROLINE HARRISON, ELEANOR SUSANNA WILLIS, ROBERT LEIGH SPENCER, WEBSTER LINDSLEY SPENCER, KATHARINE C. SPENCER, EMILY H. HAYDEN, and THE HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, and THE HOME FOR INCURABLES. } No. 615.

On motion of Mr. J. S. Flannery, attorney for the appellee The Home for Incurables in the above-entitled cause, it is by the court ordered that said appellee be allowed an appeal to the Supreme Court of the United States on giving a supersedeas bond in the sum of ten thousand dollars.

56 FRIDAY, *January 15th, A. D.* 1897.

MARY SPENCER NOBLE, PATTIE BELLE TILGHMAN, JONATHAN PERRY HARRISON, JR., SAMUEL ALEXANDER HARRISON, LUCY BIRD HARRISON, BRADFORD O. HARRISON, LYDIA CAROLINE HARRISON, ELEANOR SUSANNA WILLIS, ROBERT LEIGH SPENCER, WEBSTER LINDSLEY SPENCER, KATHARINE C. SPENCER, EMILY H. HAYDEN, and THE HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, Appellants,
vs.
THE AMERICAN SECURITY AND TRUST COMPANY, a Corporation, and THE HOME FOR INCURABLES. } No. 615.

On motion of Mr. J. S. Flannery, of counsel for the Home for Incurables, supersedeas bond on appeal to the Supreme Court of the United States approved.

57 Court of Appeals of the District of Columbia, January Term, 1897.

MARY SPENCER NOBLE *et al.*
vs.
AMERICAN SECURITY AND TRUST CO. *et al.* } No. 615.

The clerk will please issue a citation in the above-entitled cause and cite the following parties: Mary Spencer Noble, Pattie Belle Tilghman, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia Caroline Harrison, Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer, Emily H. Hayden, The Hospital of the University of Pennsylvania, and The American Security and Trust Company.

J. S. FLANNERY,
Solicitor for the Home for Incurables.

Endorsed: No. 615. Court of Appeals of the District of Columbia. Order for citation. Court of Appeals, District of Columbia. Filed Jan. 15, 1897. Robert Willett, clerk.

58 Know all men by these presents that we, the Home for Incurables (a corporation) of the State of New York, as principal, and the Lawyers' Surety Company of New York, a corporation organized under the laws of the State of New York and duly authorized to transact business in the District of Columbia, as surety, are held and firmly bound unto Mary S. Noble, Pattie B. Tilghman, Jonathan P. Harrison, Jr., Samuel A. Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia C. Harrison, Eleanor S. Willis, Robert L. Spencer, Webster L. Spencer, Katharine C. Spencer, Emily H. Hayden, and the Hospital of the University of Pennsylvania in the full and just sum of ten thousand dollars ($10,000), to be paid to the said Mary S. Noble, Pattie B. Tilghman, Jonathan P. Harrison, Jr., Samuel A. Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia C. Harrison, Eleanor S. Willis, Robert L. Spencer, Webster L. Spencer, Katharine C. Spencer, Emily H. Hayden, and the Hospital of the University of Pennsylvania, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Mary Spencer Noble and others, appellants, and The American Security and Trust Company, a corporation, and The Home for Incurables, being cause No. 615, at the October term, 1896, of said court, a decree was rendered against the said Home for Incurables, and the said Home for Incurables having obtained an appeal in open court to reverse the decree in the aforesaid suit, and a citation directed to the said Mary S. Noble and others aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof:

59 Now, the condition of the above obligation is such that if the said Home for Incurables shall prosecute its appeal to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

HOME FOR INCURABLES.
GEORGE SHERMAN, *Treasurer.* [SEAL.]
THE LAWYERS' SURETY COMPANY
OF NEW YORK, [SEAL.]
By THOMAS HUNT, *2nd Vice-President.*

Attest: JOEL RATHBONE, *Secretary.*

Sealed and delivered in the presence of—
EDWARD J. McCABE,
As to Home for Incurables.
H. G. HINTON,
As to L. S. Co.

Approved by—
R. H. ALVEY, *Chief Justice.*

60 STATE OF NEW YORK, } ss:
City and County of New York, }

On this thirteenth day of January, in the year 1897, before me personally came George Sherman, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the treasurer of the Home for Incurables, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

EDWARD J. McCABE,
[SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in New York county.

Form 3.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, Henry D. Purroy, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Edward J. McCabe has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate of proof or acknowledgment to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 13 day of Jan'y, 1897.

[SEAL.] HENRY D. PURROY, *Clerk.*

61 STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 12th day of January, 1897, before me personally appeared Thomas Hunt, 2d vice-president of the Lawyers' Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the city of New York; that he is the 2d vice-president of the Lawyers' Surety Company of New York; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as 2d vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893; and the said Thomas Hunt further said that he is acquainted with Joel Rathbone and knows him to be the secretary of said company; that the signature of said Joel Rathbone

subscribed to the said instrument is in the genuine handwriting of the said Joel Rathbone and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Thomas Hunt, 2d vice-president.

H. G. HINTON.

[SEAL.] *Notary Public, Kings County, N. Y.*

Certificate filed in N. Y. Co.

Form 3.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

I, Henry D. Purroy, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that H. G. Hinton has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument
62 duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to the said certificate of proof or acknowledgment to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 13 day of Jan'y, 1897.

[SEAL.] HENRY D. PURROY, *Clerk.*

At a stated meeting of the board of directors of the Lawyers' Surety Company of New York, held at the office of the company, Nos. 32, 34, and 36 Liberty street, in said city, on the 10th day of May, 1893, on motion, it was unanimously—

"Resolved, That, in pursuance of section eight hundred and eleven of the Code of Civil Procedure, the president, the vice-president, the acting president, or the second vice-president be, and either of them is, hereby authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the company and to attach thereto the seal of the corporation, the same to be attested by the secretary or the acting secretary."

CITY AND COUNTY OF NEW YORK, *ss.:*

I, Joel Rathbone, secretary of the Lawyers' Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 12th day of January, 1897.

[SEAL.] JOEL RATHBONE, *Secretary.*

Endorsed: No. 615. Mary Spencer Noble *et al. vs.* Amer. Security & Trust Co. *et al.* Bond of Home for Incurables on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 15, 1897. Robert Willett, clerk.

63 UNITED STATES OF AMERICA, *ss:*

To Mary Spencer Noble, Pattie Belle Tilghman, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia Caroline Harrison, Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer, Emily H. Hayden, The Hospital of the University of Pennsylvania, and The American Security and Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Home for Incurables is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 15th day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

63½ JAN. 16, 1897.

Service accepted for heirs of Mary E. Ruth.

WEBB, WEBB & LINDSLEY.

Service accepted on behalf of the Hospital of the University of Pennsylvania.

CORCORAN THOM, *Of Counsel.*

Jan. 16th, 1897.

WM. A. McKENNEY,
Sol'r for American Security & Trust.

Court of Appeals, District of Columbia. Filed Jan. 16, 1897. Robert Willett, clerk.

64 MONDAY, *January* 11, 1897.

EMELINE COLVILLE, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Trustee. } No. 614.

On motion of Mr. Edwin Sutherland, attorney for the appellant in the above-entitled cause, it is by the court ordered that said ap-

pellant be allowed an appeal to the Supreme Court of the United States on giving supersedeas bond in the sum of ten thousand dollars.

65 Know all men by these presents that we, Emeline Colville, of 112 West 104th St., New York city, as principal, and The Lawyers' Surety Company of New York, a corporation organized under the laws of the State of New York and duly authorized to transact business in the District of Columbia, as surety, are held and firmly bound unto American Security and Trust Company in the full and just sum of ten thousand (10,000) dollars, to be paid to the said American Security and Trust Company, its successors and assigns; to which payment, well and truly to be made, the said Emeline Colville binds herself, her heirs, executors, and administrators, and the said surety company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Emeline Colville, appellant, and the American Security and Trust Company, trustee, being cause No. 614, at the October term, 1896, of said court, a decree was rendered against the said Emeline Colville, and the said Emeline Colville having obtained an appeal in open court to reverse the decree in the aforesaid suit, and a citation directed to the said American Security and Trust Company, aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Emeline Colville shall prosecute her appeal to effect and answer all damages and costs if she shall fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

EMELINE COLVILLE. [SEAL.]

66 THE LAWYERS' SURETY COMPANY OF NEW YORK,

[SEAL.] By THOMAS HUNT, *2d Vice-President.*

Attest: LOUIS E. KUSTER,
Acting Secretary.

Sealed and delivered in the presence of—
LOUIS F. RYAN,
H. G. HINTON,
As to L. S. Co.

Approved by—
R. H. ALVEY,
Chief Justice,

As a supersedeas.

STATE OF NEW YORK, } ss:
County of New York, }

On this 21st day of January, 1897, before me personally came Emeline Colville, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged to me that she executed the same.

LOUIS F. RYAN,
[SEAL.] *Notary Public* (57), *N. Y. County.*

67 STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 21st day of January, 1897, before me personally appeared Thomas Hunt, 2d vice-president of the Lawyers' Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the city of New York; that he is the 2d vice-president of the Lawyers' Surety Company of New York; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as 2d vice-president of said company by like authority; and the said Thomas Hunt further said that he is acquainted with Louis E. Kuster and knows him to be the acting secretary of said company; that the signature of said Louis E. Kuster subscribed to the said instrument is in the genuine handwriting of the said Louis E. Kuster, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Thomas Hunt, 2d vice-president.

H. G. HINTON,
[SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in N. Y. Co.

At a stated meeting of the board of directors of the Lawyers' Surety Company of New York, held at the office of the company, Nos. 32, 34, and 36 Liberty street, in said city, on the 10th day of May, 1893, on motion, it was unanimously—

"Resolved, That, in pursuance of section eight hundred and eleven of the Code of Civil Procedure, the president, the vice-president, the acting president, or the second vice-president be, and either of them is hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the
68 company, and to attach thereto the seal of the corporation, the same to be attested by the secretary or the acting secretary."

CITY AND COUNTY OF NEW YORK, ss:

I, Louis E. Kuster, acting secretary of the Lawyers' Surety Company, having compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 21st day of January, 1897.

[SEAL.] LOUIS E. KUSTER,
Acting Secretary.

Endorsed: No. 614. Emeline Colville, appellant, *vs.* American Surety and Trust Company, trustee. Bond of Emeline Colville on appeal to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Jan. 28, 1897. Robert Willett, clerk.

69 UNITED STATES OF AMERICA, *ss:*

To American Security and Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Emeline Colville is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 28th day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

1897, Jan'y 28.

Service accepted.

WM. A. McKENNEY,
Att'y American Security & Trust Co.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 28, 1897. Robert Willett, clerk.

70 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 69, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Emeline Colville, appellant, *vs.* American Security and Trust Company, trustee, and Mary Spencer Noble *et al.*, appellants, *vs.* The American Security and Trust Company *et al.*, Nos. 614 & 615, January term, 1897, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 4th day of February, A. D. 1897.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case Nos. 16,490 & 16,496. District of Columbia Court of Appeals. Term No., 304: The Home for Incurables, appellant, *vs.* Mary Spencer Noble *et al.;* filed February 10, 1897; and Term No., 309: Emeline Colville, appellant, *vs.* The American Security and Trust Company. Filed February 19, 1897.

No. 57 and 61.

Brf. of Yeaman for Appt. et al.

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Oct. 1, 1898.

No. 57

THE HOME FOR INCURABLES,

Appellant,

vs.

MARY SPENCER NOBLE ET AL.

No. 61

EMELINE COLVILLE,

Appellant,

vs.

THE AMERICAN SECURITY AND TRUST COMPANY.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT THE HOME FOR INCURABLES.

GEO. H. YEAMAN,
J. S. FLANNERY,
GEO. C. KOBBE,
Of Counsel.

THE EVENING POST JOB PRINTING HOUSE, N. Y.

IN THE

Supreme Court of the United States.

October Term, 1897.

THE HOME FOR INCURABLES, Appellant,

v.

MARY SPENCER NOBLE *et al.*

No. 304.

AND

EMELINE COLVILLE *et al.*, Appellants,

v.

THE AMERICAN SECURITY AND TRUST COMPANY, a corporation, and THE HOME FOR INCURABLES.

No. 309.

BRIEF FOR APPELLANT, THE HOME FOR INCURABLES OF NEW YORK.

This is an appeal from the decree of the Court of Appeals of the District of Columbia, reversing the decree of the Supreme Court of the District of Columbia, construing the last will and testament of Mary E. Ruth and the codicil thereto.

Statement of the Facts.

The will of the testatrix, bearing date June 1, 1892 (7), left her entire estate to the appellee, the American Security and Trust Company, for the erection of a trust, the purposes and limitation of which are not material to the question here discussed, further than that the trust terminated, in any event, at the death of the granddaughter of the testatrix, Sophia Y. Huston, the beneficiary in the trust.

By the third clause of her will (8), the testatrix directs that at the termination of said trust the appellee, the American Security and Trust Company, her executor and trustee, shall "convey and deliver over" $5,000 of her estate to the *Hospital of the University of Pennsylvania*, to be used by said hospital "to endow and forever maintain a first-class perpetual bed in said hospital, in the City of Philadelphia, said bed to be in the name of my beloved son Melancthon Lore Ruth."

By the same clause, she gives the "residue and remainder" of her estate to the appellant, the *Home for Incurables* at Fordham, New York City, to be used by it "to endow and forever maintain *one or more beds* in said home, in the name and memory of my beloved son Melancthon Lore Ruth."

Then follows the appointment of guardians of the person of her granddaughter, Sophia Y. Huston, and the appointment of the appellee, the American Security and Trust Company, as her executor.

By a codicil, made on the same day, June 1, 1892, testatrix says, "I hereby revoke and annul the *bequest* therein made by me to the *Home for Incurables* at Fordham, New York City, in the State of New York, and I hereby *give and bequeath the five thousand dollars* (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York City, said *bequest*

being on account of her kindness to my son and myself during his and my illness and my distress" (9).

There being in these three provisions an apparent ambiguity and inconsistency, the appellee, the American Security and Trust Company, filed a bill in equity to obtain a construction of the will and codicil, and for directions to the executor how to administer the estate. By his decree (29), Mr. Justice Cox, of the Supreme Court of the District of Columbia, sustained the contention of the appellant, the Home for Incurables, and held that "the legal effect of the codicil executed by the testatrix, Mary Eleanor Ruth, on the 1st day of June, 1892, to her will of the same date, as shown in the proceedings, was to revoke the legacy of five thousand dollars given in and by said will to the Hospital of the University of Pennsylvania and to substitute Mrs. Emeline Colville as the legatee of said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvania, but not to revoke the residuary bequest in said will contained in favor of the Home for Incurables at Fordham, in New York City" (29). No evidence was taken in the cause, and the whole case was presented as a question of law arising under the will and codicil.

Assignment of Errors.

The Court of Appeals of the District of Columbia erred:

I.—In directing the Supreme Court of the District of Columbia to vacate its decree theretofore entered herein and to enter a decree in conformity with the opinion of said Court of Appeals of the District of Columbia.

II.—In holding the true legal intent and meaning of the will and codicil of Mary Eleanor Ruth to be that the bequest of five thousand dollars to the Hos-

pital of the University of Pennsylvania remained intact and unaffected by the codicil.

III.—In holding that the bequest of the rest and residue of the estate to the Home for Incurables at Fordham, in the City of New York, was revoked by said codicil.

IV.—In holding that out of the said rest and residue there was bequeathed to Mrs. Emeline Colville the sum of five thousand dollars.

V.—In holding that the remainder of the estate is distributable to the next of kin of Mrs. Ruth in accordance with the provisions of the statute of distributions.

VI.—In not holding that the true intent and meaning of the testatrix, Mary E. Ruth, as expressed in her said will and codicil, and that therefore the legal construction and effect of said will and codicil, is to give, devise and bequeath her residuary estate to the Home for Incurables at Fordham, New York.

POINTS AND AUTHORITIES.

I.

The construction placed upon the codicil by the decree of the Supreme Court of the District is a reasonable and proper one, and is in accord with the evident intention of the testatrix.

It is often said that the primary rule for the construction of wills is to ascertain and carry into effect the intent of the testator. This is certainly true, and yet it is a rule which, taken by itself, is very often of little or no assistance. It

may be said that the intent *is the will*, provided the will be executed with the formalities required by law, and within the scope and effect allowed by law for testamentary disposition. Therefore, in searching for that intent, resort must usually be had to other rules of construction.

Of the rules most applicable to the case in hand are: (1) To find the intent, if possible, within the four corners of the will; (2) to give the will such construction, if possible, that all its provisions may have effect, and (3) if this be not practicable, in the literal terms of the will, then those provisions must fail, the rejection of which, for inconsistency, would do the least violence to the *general scheme* of the will.

Every will must be construed in the light not merely of its special provisions, but to preserve and give effect to the intention of the testator. What was the intention of the testatrix here, as evidenced by the language of her will? It was plainly her purpose to provide for her granddaughter as long as she might live, and at the latter's death, which had occurred before the bill was filed, to have her estate *go for the perpetuation of the memory of her deceased son.* This, undoubtedly, was the end she had in view, and the scheme of disposition outlined in the will was the means taken to accomplish that end.

We have in this will a scheme—a trust for life, income to life tenant, and at her death, or the sooner termination provided for the trust, remainder to two institutions, the bequest of $5,000 to one, the Hospital of the University of Pennsylvania, and the total residue and remainder to the *Home for Incurables.* So far, there is not a particle of doubt. There is the clear intent to dispose of the whole estate. No question of intestacy could arise, nor could there be any question as to the proportions in which the two institutions are to take. One is to take a definite sum, the other to have all that remains.

The doubt arises touching the intent and effect of the codicil. It revokes "the *bequest* therein made to the Home for Incurables," and gives "*the* five thousand dollars (heretofore in my will bequeathed to the Home for Incurables) to my friend Mrs. Colville."

There is no bequest of $5,000 to the Home for Incurables. There is a bequest of $5,000 to another legatee, the Hospital of the University of Pennsylvania. In the codicil, the testatrix was dealing with a *definite sum*, the sum of $5,000, which was given to one legatee in the will and which is taken away by the codicil and given to another legatee. Mrs. Colville is not made the residuary legatee. The residuary clause is not interfered with. The amount of that residuary bequest may be more and may be less than $5,000. But the testatrix deals with an *exact sum*, and expresses the intention to revoke the bequest of *that sum* to one legatee, and to "give *the* five thousand dollars" to another legatee. The particular sum given is identified by reference to *the same sum* "heretofore" given to another legatee. The mind of the testatrix was clear on that point. She, or the attorney who drew the codicil, confused the application of her intention by mistaking, not the *sum* given to, but the *name* of, the previous legatee. It seems to be a clear case of mistake on the part of the scrivener, in writing "Home for Incurables" instead of "Hospital of the University of Pennsylvania," and a failure of the testatrix to observe the mistake before signing. The codicil speaks of a legacy of $5,000. That much is arithmetically certain. The will had given it to the Hospital of the University of Pennsylvania. When the codicil speaks of it as a legacy given by the will to the Home for Incurables, it is infinitely more reasonable to infer that the testatrix or her attorney made a mistake of name than that she intended to cut off the Home entirely from a residuary bequest and *devise*, the amount of which was not named, and could not have been named.

The construction of this will contended for by the Home for Incurables, and adopted by the Supreme Court of the district, is not only founded upon the soundest principles of common sense, but is sustained by all the authorities.

The rule that a later provision in a will controls an earlier provision, upon the ground that it is the last expression of testamentary intent, is one of convenience only. It is not rigid, but yields to the general intent—to the scheme of the will.

Where a bequest is made in clear and unambiguous terms, it would be against every principle of construction to permit such a gift to be revoked by doubtful expressions in a codicil. As a general rule, it is said, that in order to revoke a clear devise, the intention to revoke must be as clear as the devise.

Williams' Ex'rs (6th Am. Ed.), 220.
Boseley *v.* Boseley, 14 How., 395.
Johns Hopkins Universty *v.* Pinckney, 55 Md., 363.

In giving construction to a will, all parts of it should be examined and compared, and the intention of the testator must be ascertained not from a part, but from the whole of the instrument.

Lane *v.* Vick *et al.*, 3 How, 464.

Where there are two intents expressed in a will the primary must control the secondary—the general, the particular.

Smith *v.* Bell, 6 Peters, 84.
Simpers *v.* Simpers, 15 Md., 180.
Taylor *v.* Watson, 35 Md., 519.
Jones *v.* Earle, 1 Gill., 395.

The clear general intent of this will was to provide for the granddaughter of the testatrix as long as she might live, and, upon her death, to perpetuate the memory of the testatrix's deceased son. The particular intent expressed in the codicil is to give

a pecuniary legacy to a friend—Mrs. Colville. This particular intent must be controlled by the clear general intent of the will. The names of two charitable institutions were accidentally and inadvertently confused, not exactly transposed, but one name written where the other was intended to be written. Any other view results in holding that the testatrix, in making her codicil, and giving to a "dear friend," overlooked in the will, a definite sum therein otherwise disposed of, did, by her codicil, change the whole scheme of her will, and deliberately concluded to die intestate as to the greater part of her estate. The will is entirely clear. The codicil, taken literally, has no meaning, and therefore will not be allowed to override and subvert the will.

The general intention of the testator, although first expressed, will overrule a particular intent.

Pue *v.* Pue, 1 Md. Ch., 382.
Chase *v.* Lockerman, 11 Gill & J., 186.

This latter construction is especially favored when the *posterior* paper is a *codicil* and is inadequate to the disposition of the *entire* property, so that the consequence of rejecting the prior document, the will, would be to produce partial intestacy.

1 Jarman on Wills (5th Ed., 175).

"Numerous are the questions which have arisen in regard to the extent to which a codicil affects the disposition of a will or antecedent codicil, and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper.

"In dealing with such cases it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil."

1 Jarman on Wills (5th Ed.), p. 176, and cases cited in note 2.
Pue *v.* Pue, *supra.*

"The disposition of a will will not be disturbed by an erroneous recital of its contents in a codicil,

unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

"Thus, where a testator [Skerratt *v.* Oakley, 7 T. R., 492], after bequeathing certain legacies to his wife, devised to her for her life certain leasehold premises at *Northwood*, and he gave his leasehold estate at Wrentnall, and his estate at Northwood, after his wife's death, and the residue of his estate to other persons. In a codicil *executed on the same day* he directed that the bequest to his wife in his will should be in full of all her claims on his estate, except the estate for life of his 'wife and her assigns in the premises at Wrentnall, anything in the foregoing will to the contrary notwithstanding.' It was contended that the widow was entitled to the *Wrentnall* estate, under her husband's codicil, it being manifest by the concluding clause that he intended to give her something to which she had no right by the will; but the Court decided against the widow's claim. *Lord Kenyon said that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word 'Wrentnall' was written in the codicil instead of the word 'Northwood.'*

1 Jarman on Wills (5th Ed.), 530.

It has often been said that no two wills, or will cases, are exactly alike, and that each must be considered upon its own facts. The case just cited is probably more like the case at bar than any other to be be found in the books.

II.

To adopt either of the theories of construction contended for by the respective counsel for the Hospital of the University and the heirs of Mrs. Ruth, or the one adopted by the prevailing opinion of the Court of Appeals, would be to make a new and different will for the testatrix.

1.

The Hospital of the University of Pennsylvania contends that the legacy given to it by the will was not intended to be revoked by the codicil. Mrs. Colville and the heirs necessarily concede this claim in order to lay a foundation for their own theories of construction.

We have endeavored to show in the first part of this brief that it was the intention of the testatrix to revoke the legacy of $5,000 given to the hospital and to give it to her friend Mrs. Colville, but that the attorney who drew the codicil confused the names of the two institutions, and substituted "Home for Incurables" for "Hospital of the University of Pennsylvania." The testatrix feeling, no doubt, that she had sufficiently carried out her intention of perpetuating the memory of her son by making the Home for Incurables a charitable institution, her residuary legatee, instructed her attorney to revoke the legacy of a specific sum which she had given to another charitable institution—the Hospital of the University of Pennsylvania—and leave it to a friend, Mrs. Colville. It was undoubtedly the intention of the testatrix to give Mrs. Colville the sum of $5,000; not $5,000 of the residuum which had been left to the Home for Incurables, but the identical $5,000 which had been given by her will to another. There was only one such bequest mentioned in the will—the legacy to the hospital, and if Mrs. Colville should receive that, then the hospital should take nothing.

2.

On behalf of Mrs. Colville, it is urged that it was the intention of the testatrix to give $5,000 to the Hospital of the University of Pennsylvania, and to leave the whole of the residuum to her. Such a construction is not only at variance with the express words of the codicil but it is con-

trary to the plain intention of the testatrix, which was to perpetuate the memory of her son Would the testatrix have caried out her intention of founding a memorial to her son if she had left a small legacy to a single charitable institution and given the bulk of her estate to a friend, at whose death it would go to strangers?

Aside from the unreasonableness of such a theory upon its face, we have positive evidence in the wording of the will and codicil to show that the codicil was not designed to pass more than a *mere legacy*. At the time of the making of the will the testatrix's estate consisted of both real and personal property. In her will, after making provision for the gift of $5,000 to the hospital, she says, "*I give, devise, and bequeath*" the residue and remainder, making use of the legal expression for the testamentary disposition of real and personal property. In the codicil, however, she employs words carrying personal property alone, and says, "I hereby revoke and annul the *bequest*" and "I hereby *give* and *bequeath* the five thousand dollars," &c.

Bouvier defines "bequest" to be: "A gift by last will or testament; a legacy. This word is sometimes, though improperly, used as synonymous with devise. There is, however, a distinction between them. A *bequest* is applied more properly to a *gift by will of a legacy*, that is, of personal property; *devise* is properly a *gift by testament of real property*."

This will was not drawn by a testatrix ignorant of legal phraseology; but was drafted by a lawyer skilled in the use of technical language and understanding the legal signification of the words employed. Had the attorney who drew this codicil really intended it to carry the whole residuary estate of the testatrix, he would have employed language broad enough to embrace both real and personal property. It is perfectly plain from the wording of these two papers that it was the intention of the attorney who drew them to revoke by

the codicil a mere "*bequest*"—a *legacy*—and to "bequeath" that same legacy to another.

If nothing but a *legacy* was revoked, Mrs. Colville takes nothing but a *legacy*, and her claim to the residuum falls to the ground.

3.

The heirs insist that the testatrix intended to give $5,000 to the hospital, $5,000 to Mrs. Colville, and that she died intestate as to the remainder of her estate. This is incredible upon its face. We are asked to assume that the testatrix intended to provide a life estate for her granddaughter; and, upon the death of the latter, carve two pecuniary legacies out of her estate and die intestate as to the bulk of her property. An inspection of the will and codicil will show the fallacy of such a contention. The second clause of the will says: "I give, devise, and bequeath *all of my estate*, real, personal, or mixed, whether in possession, reversion, or remainder, now acquired or hereafter to be acquired"—thus showing an intention to dispose of *all* of her property. In the codicil she says: "I hereby revoke and annul the *bequest* therein made," and "I hereby give and *bequeath*," &c. The testatrix does not revoke a *devise* of *realty*, but merely a *gift* of *personalty*. Nothing whatever is said in the codicil about revoking the disposition of the residuum or about bequeathing and devising that residuum to another. The bequest of a *legacy of* $5,000 is revoked and given to some one else. *The gift of the residuum to the Home for Incurables has not been touched.*

The legal terms of the will and codicil show that it was not the intention of the draftsman to have the testatrix die intestate as to any portion of her estate. As he was carrying out her instructions, his intention must be taken as an expression of her will. The testatrix has nowhere in her will indicated that she desired any of her property to go to her heirs generally or to her collateral kindred.

Her whole purpose indubitably was to remember her own flesh and blood—living and dead.

The theories of interpretation here controverted are untenable because they are based upon a mere slip of the pen—instead of resting upon the more substantial foundation of *testamentary intent;* and counsel for the Home for Incurables feel that they can safely rest their client's cause upon the lucid and very able dissenting opinion of Mr. Chief Justice Alvey (44–46).

It is respectfully submitted that the decree of the Court of Appeals should be reversed.

GEO. H. YEAMAN,
J. S. FLANNERY,
GEO. C. KOBBÉ,
Of Counsel for Home for Incurables.

In the Supreme Court of the United States.

EMELINE COLVILLE,
v.
THE AMERICAN SECURITY AND TRUST COMPANY, *et al.* } No. 61.

Brief in behalf of plaintiff in error, Emeline Colville.

STATEMENT.

This is an appeal from a decision of the Court of Appeals of the District of Columbia, construing the will and codicil thereto, of Mary Eleanor Ruth.

A bill for the construction of the will in question was filed on October 2, 1898, on the Equity side of the Supreme Court of the District of Columbia (Record p. 2), and a decree was passed in said cause in which it was adjudged that the legal effect of the codicil, which is the portion of the instrument requiring construction, was to revoke the legacy of five thousand dollars given in and by said will to the Hospital of the University of Pennsylvania (see Will. Exhibit A, Rec. pp. 6-9) and to substitute Mrs. Emeline Colville as the legatee of said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvia, but not to revoke the residuary bequest in said will contained in favor of the Home for Incurables at Fordham, in New York City (Record p. 29).

The learned Court of Appeals for the District of Columbia reviewiug the finding of the court below, arrived at a radically different conclusion, and held that:

"It is the true legal intent and meaning of the will and codicil that the bequest of five thousand dollars to the Hospital of the University of Pennsylvania remains intact and unaffected by the codocil; that the bequest of the rest and residue of the estate to the Home for Incurables at Fordham in the City of New York, was and is revoked by the codicil; that out of this rest and residue there is bequeathed to Mrs. Emeline Colville the sum of five thousand dollars; and that the remainder of the estate is distributable to the next of kin in accordance with the provisions of the statute of distributions." (Record p. 44).

A dissenting opinion on the part of the learned Chief Justice of the Court of Appeals to the effect that the decree appealed from should be affirmed (Record pp. 44-47) only emphasizes this apogee and perigee of judicial opinion, and in one sense, it may fairly be said that "Honors are easy."

The Will proper, which is dated June 1, 1892, disposed of all the estate—real, personal and mixed—to the American Security and Trust Company, in trust, to invest and reinvest the proceeds of the estate in certain described securities, with directions as to the time and manner of the distribution of the proceeds, and further provides that in the event of the death of testator's legatee, or the happening of another contingency, the trust created by the will should cease and determine, and thereupon a bequest of $5,000 should become due and payable to the Hospital of the University of Pennsylvania, and all the rest and residue of the said estate should go to the Home for Incurables at Fordham, New York City. (Record, pp. 7-9).

On the same day a codicil was executed by the testatrix which very materially altered the distribution of her estate,

and which has given rise to the present controversy. Being short it is set out here in extenso:

"I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament: I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore bequeathed in my will to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York City, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

"In witness whereof I have hereunto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will.

MARY E. RUTH."

To the bill seeking a construction of the above will and codicil answers were filed, which need not be here noticed, except to say that the answer of Emeline Colville alleged as matter of law a plain intention on the part of the testatrix to dispose of her whole property, a carrying out of that intention by the will and codicil, a revocation of the bequest of the rest and residue of the property to the Home for Incurables, and the disposition of said rest and residue to the said Colville; with said answer is coupled a demurer setting up that the heirs at law are not and can not be proper parties to the suit for the reason that the testatrix by her will and codicil made a complete disposition of all her property and purposely bequeathed all her property away from her heirs at law and next of kin. (Rec. pp. 15-17.)

Due proceedings were thereupon had, resulting in the decree of the Equity Court (Rec. p. 29), and the opinion and decree of the Court of Appeals (Rec. pp. 36-44.)

ASSIGNMENT OF ERRORS.

1. The Court erred in overruling the demurrer of Emeline Colville.

2. The Court erred in holding that the testatrix failed to carry out her intention of dying testate as to all of her property.

3. The Court erred in holding that the property bequeathed by the will to the Home for Incurables, and revoked by the codicil, did not go to the appelant, Emeline Colville, by said codicil.

4. The Court erred in denying to the testatrix testamentary liberty.

ARGUMENT.

1. The demurrer of the appellant, Colville, should have been sustained.

The claims of the devisees under the various possible constructions of the will and codicil, if joined, would represent unity, and consequently the testatrix would be testate as to all her property.

While ambigious gifts in wills are treated with scant courtesy by the English courts, on the principle that an unambigious disposition is necessary to defeat the title of the heir at law, next or kin, residuary devisee, or legatee, or person entitled in default of appointment, yet conflicting claimants under a will are entitled to join their claims and ask for a declaration of intestacy as against the heir or next of kin without seeking a construction as between themselves. Forrester, In Re Jervis against Forrester, 13 times, Law Rep. 555. In this case the Forrester trustees and the Attorney General joined forces against the next of kin, and successfully contended that there was a general dedication to charity and no intestacy.

In the case at bar the moving cause of the bequests in the will to the University of Pennsylvania and the Home for Incurables in and by which all of the testatrix's property was disposed of, was commemoration of the memory of her son Melancthon Love Ruth [Rec. p. 8]. In the codicil the moving cause for an alteration in the pathway of distribution of a portion of the property, to wit: the rest and residue was commemoration of her son's memory and gratitude for ministrations bestowed upon that son, and the testatrix, in a time of distress and illness [Rec. p. 9].

So that we have a general dedication to charity and gratitude, a fixed intention to die testate, and no intestacy.

Assignments two, three and four will be considered together.

It is desired first to note that while it is respectfully submitted ample warrant may be found in English cases to sustain the contention of complete testacy herein made, yet, because of the striking differences between the English and American law of wills, the English authorities should only be resorted to when the American authorities have failed to furnish a solution.

Digressing for a moment, the distinction between the American and English law on the subject of Maritime law is just as marked as as in the law of wills. As for instance: A vessel in charge of a pilot whose employment is made compulsory by the laws of the port to which she has sailed, is held liable by the Supreme Court of the United States in case of a collision the vessel being in fault. In England a contrary result is reached, even apart from exonerating statutes because the maritime law has shown a tendency to assimilate common law doctrines, under the influence of a Court of Appeal largely composed of common law lawyers.

Returning to the law of wills, it is an ordinary rule of American law that a devise of an interest without any indication of the extent of the interest devised gives only a life

estate, but if there can be gathered from expressions in other parts of the will, evidence that, by the language of the devise a fee simple was intended to pass, *the Court will give effect to that intention.*

The English courts do not follow the latter branch of the above rule, because of their policy to keep the estate together under their law of primogeniture.

They consequently decline to construe a will so as to take the inheritance from the heir, except upon plain expression of intent in apt terms in the particular instance ; *but the policy of the American law is to find and execute the intention of the testator*, so that American courts are not called upon to watch with brooding care over the heir.

But even eminent English jurists, impelled as they were by environment, inclination, and law, to uphold and maintain the inheriiance of the heir, have used the following language:

"However capricious or harsh or even cruel his testamentary act may be thought to be; however hard it may be upon the interest of those whom the feelings of man, and almost the ordinances of God, require should be provided for, nevertheless the law gives him this liberty and his will must prevail. To do otherwise would be, in the view of our law, to make a man's will for him, and not allow him to make it himself. Besides disinheriting his children, he is at liberty to make his will the medium of displaying his vanity, of gratifying grudges, indulging in idle caprice, and fooling the world to the top of his bent, provided only and always he is not lacking in mental capacity, and observes certain forms in the publication of his testamentary purposes."

It is respectfully submitted that the issue in this case is much broader than the mere question of whether or not certain heirs of the testatrix shall receive their proportionate part of her estate, or whether the entire estate shall be considered to have been devised. The real question is whether

the testatrix shall be permitted testamentary liberty, or whether the law shall arbitrarily step in and write a will for her.

The points raised will appear more clearly if we take a brief historical view of the rise and progress of the law of wills.

We may assume that a primiative state of society at one time existed where, property vesting by common consent in the individual under the right of occupancy, yet that right only continued in the occupier while he lived. Out of the strife and confusion begotten by such a state a system was evolved by which the title of a dead proprietor descended at once.

As the progress of individual ownership and succession has fundamental ideas of primative estate, contrasted with occupancy for a life time, it is safe to assert devolution of property took the following course:

1 Appropriation by Government, that is to say, by the strongest of the survivors surrounding the deceased.

2 Promulgation of a general scheme by that Government in obedience to the profound conviction of the individuals, whereby the inheritance vested in the member or members of the decedent's family.

3. Recognition of a right in the individual owner to dispose of the title at his own choice, and in variance, if need be, of the usual rules of inheritance.

In this last recognition by society lies the sanction of a will; and this sanction reaches its refinement when we find the dead proprietor's wishes so far respected by the Government, and by his fellow men, that he may safely disinherit or transmit it to strangers, or provide for the default of his own kindred, or bestow at pleasure upon selected objects of charity by the formal declaration of his last wishes to that effect.

Until comparatively modern times one's testamentary right of disposition remained obstructed by certain arbitrary rules of distribution, now obselete.

Upon the property of every one who dies it may be said that one or another of two schemes of legal disposition obtains:

1. There is the will of the State; or, as the formal phrase goes, the will which the law draws up.

2. There is the will which the individual has made up himself.

In the former consists the expressions of the public, the legislation, presenting what the State deems the vital scheme; in the latter that which the owner has designed to suit his special circumstances, and which admit of the widest variety of forms. It sometimes happens that the individual scheme as set forth coincides with that of the State; but more commonly the individual scheme seeks to work out a total disposition of its own, differing from that of the State.

Where does the will of the State continue paramount to that of an individual? Or, in other words, what restrictions does public policy place upon one's power of testamentary disposition?

1. Wherever the individual, because of unsound mind, intoxication, or some special subjection in his surroundings to fraud and undue influence must be decreed incapable of making the will.

2. Where the formalities required by law in the execution of wills are not complied with.

3. Where a revocation has been made by the individual directly or by circumstances, and no subsequent disposition has been made.

4. Where on grounds of public policy it is thought unjust to permit the provisions of a will to stand.

5. Where statutory protection is extended to the widow or the husband granting the right of renunciation.

6 Where children are not specifically and intentionally omitted or disinherited, public policy decrees intestacy as to them and the will drawn up by the law operates for their benefit.

7. Where perpetuity is sought to be established, or the free circulation of property is fettered unreasonably long.

8. Where illegal purposes are sought to be accomplished.

9. Where persons incapable of taking are named as legatees.

10. Where provisions are hopelessly vague and uncertain.

The principle objections urged to the liberty of arbitrary wills are: That it is contrary to the laws of nature. that it is an inovation and entire subjection of that course of equal succession which positive law has established in the case of intestatcy, that it breeds family disensions, that it encour ages frauds, and jeopardizes seriously public interests. While these objections are grave and deserving of careful consideration it is confidently asserted they do not furnish sufficient reasons for interfering with the full liberty of testamentary disposition obtaining under American law.

To say that this liberty is against the law of nature because it permits a father to disinherit a child, with or without good cause is an error; and the error consists in considering that children have by the law of nature a vested right in the parent's property made vacant by his death, an error which flows from the mistaken notion that the institution of property rests on any natural right of man as a human being; the same argument applies with equal or even greater force to the proprietor's collateral relations.

Bearing in mind that under the law of nature the nature of property is subsistance, that the mode of acquiring property is by occupancy which can only last while the body lasts, that the transfer of property requires the consent of the proprietor which can of course be expressed only while he lives, the conclusion is irresistable that by the natural

law the death of a proprietor does not, in and of itself, operate to transfer his property to any other person, but, on the contrary, the property must either revert to the common stock or be left vacant to become the spoil of the strongest.

A plausible and strong argument against arbitrary wills is that principles of conscience and equity which seek the dictates of the law of nature, are recognized by and made a part of the Statute regulating the intestate's succession. The sufficient answer is that laws of inheritance are not designed or intended as favors bestowed upon a man's children or kindred for their own benefit; like all other laws of property they rest upon the foundation of general utility and the common advantage.

The fact that in some individual cases such a liberty may be abused, is not a good reason for denying the liberty provided the experience of society has shown that general liberty, though liable to abuse in particular cases is better for the general good than to restrain the liberty.

Granting that a father is guilty of cruel and unconscionable conduct who without cause wills property away from his children and kindred, how can the legislature or judicial construction prevent these faults without creating more mischief and general inconvenience than is sought to be remedied

In the case of Eyre *v.* Jacob, 14 Gratt. in sustaining the Constitutional validity of a Collateral Inheritance Tax Act, the judge who delivered the opinion of the Court of Appeals of Virginia broadly declared: "The right to take property by devise or descent is the creature of law and secured and protected by its authority. The legislature may, if it see proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, or to his lineal descendants and ascendants, it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may, to-morrow, if it pleases, abso-

lutely repeal the statute of wills and that of descent and distribution, and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses."

In Brettum *v.* Fox, 100 Mass. 234, the Court say: "The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away or limited and regulated in whole or in part by the legislature."

It is obvious, if the language of the writers and judges referred to be taken without restriction that as against the legislative power of the State the right of the owner of the property, though held in fee or absolute ownership, would be little if anything more than an estate for life, since the State by denying the right of the owner to transmit, could appropriate the property to its own use, thereby constituting itself the universal successor, and could make this policy effectual by prohibiting gifts, deeds or donations which contravened it. It may be confidently asserted, however, that the legislature while having power to regulate the right of succession can not deny it by enactments which are not intended as regulations of the right, or measures of reasonable and equal taxation to raise revenue for public uses, but which are confiscatory in their nature.

Turning to reported decisions we find the following propositions settled, and well settled, by the Supreme Court of the United States and the courts of last resort of the various States:

That cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, *who may always look upon the*

intention of the testator in the particular case as the pole star to direct them in the construction of wills.

Smith *v.* Bell, 6 Pet. 68.
Colton *v.* Colton, 127 U. S. 300.
Hardenburg *v.* Ray, 151 U. S. 112.

That the construction put upon the words of one will does not necessarily furnish a rule for construing the same words in another will, nor does it necessarily furnish a settled and fixed rule of construction which ought to be respected. White such a principle ought not to be totally disregarded it should never be carried so far as to defeat the plain intent of the testator, if that intent may be carried into execution without violating the rules of law:

Colton *v.* Colton, 127 U. S. 300.

That the court must give such a construction as to support the intent of the testator even against grammatscal rules; and to effectuate his evident intention, words and limitations may be transposed, rejected or supplied.

Daniel *v.* Whartenby, 18 Wall. 636.
Pond *v.* Berg, 10 Paige 140.
Appeal of Merkel, 109 Pa. 235.
Terry's Appeal, 102 Pa. 235.
Graham *v.* Graham, 23 W. Va., 36.
Estate of Wood, 36 Cal. 75.
Hammond *v.* Ridgley, 5 H. and J. 245.

That the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given.

Patch *v.* White, 117 U. S 210.
Lee *v.* Simpson, 134 U S. 572.
Hardenburg *v.* Ray, 151 U. S. 112.

That where the attempt to make a complete disposition of all the testator's property is manifest, its provisions should

be so construed, if they reasonably may be to carry into effect his general intent.

Given *v* Hilton, 95 U. S. 591.

That it is well settled by the authorities that when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate; and that when the words of a will fairly carry the whole estate of which he dies seized and possessed, there is no presumption of an intention to die intestate as to any part of his estate.

Hardenburg *v.* Ray, 151 U. S.
Johnson *v.* Trust Company, 79 Md. 18.

That it is the duty of the court to make a will effective if possible.

Bradley *v.* Packet Co., 13 Pet. 89.
Lycan *v.* Miller, 112 Mo. 548.
Bonard's Will, 16 Abb. Pr. N. S. 202.
Bosley *v.* Bosley's Exrs., 14 How. 390.
Burwell *v.* Executors, 2 How. 560.
Weidman's Appeal, 42 Leg. Int. 338.

That whilst no bill in Equity lies to reform a will because its author is dead and his intent can only be known from the language he has used, yet a careful study of that language will generally disclose any inadvertance or mistake in the description of persons or things and the manner in which it should be corrected.

Colton *v* Colton, 127 U. S. 300.
Patch *v.* White, 117 U. S. 210.

That whether the property passes to the devisee or descends to the heir, as in a case of intestacy must depend upon the intention of the testator, to be gathered from the will and codicil. It is always and necessarily a question of intention. No two wills, probably, were ever written in precisely the same language throughout, nor any two testators die un-

der the same circumstances in relation to their Estates, families and friends. And it would be very unsafe as well as unjust to expound the will of one man, by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it.

Bosley *v.* Bosley Exrs., 14 How. 390.

That while there are undoubtedly fixed rules of law in relation to the construction of certain words and phrases in a will, which have been established by a long course of judicial decisions, and which have become landmarks of property, and cannot therefore be disturbed, yet in most of the cases in which they have been applied it is to be feared that they have not accomplished, but defeated, the testator's intention, they owe their origin to the principles of the feudal system, which always favored the heir at law because it was its policy to perpetuate large estates in the same family. The policy and institutions of this country are adverse to the feudal policy of favoring the heir at the expense of the devisee.

Bosley *v.* Bosley's Exrs., 14 How. 390.

That the language of a will *is to be interpreted in subordination to the intention of the testator*, and is not to control that intention when it is clear and determinate.

Burwell *v.* Mandeville's Exrs., 2 How. 56.

That courts have always been astute to find reasons for rescuing a will from the artificial rule established in favor of the heir at law, and will not even be acute in searching for reasons to restore its force where the statute has not abolished it.

King *v.* Ackerman, 2 Black 408.

That the Court ought not, without absolute necessity, let itself embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, it

should be given, that the will of the testator may be operative; and where two or more meanings are presented for consideration the Court must be well assured that there is no sort of argument in favor of one view rather than another before it rejects the whole. It is true that the heir at law shall only be disinherited by clear intention, but if there be ever so little reason in favor of one construction of a devise rather than any other, we are at least sure that this is nearer the intention of the testator than that the whole should be void any the heir let in.

Adams *v.* Jones, 9 Hare. 485.

Mason *v.* Robinson, 2nd Sim. & St. 295.
Ld. Broughan, 6 Mann. & Gr. 379.

That under the state of the science of law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument.

Giles *v.* Littie, 104 U. S. 291.

That the decision of the question raised by ambiguous expressions *depends upon the intention of the testator as manifested by the words he has used*, and an omission to express his intention cannot be supplied by conjecture; but if a reading of the whole will produces a convictlon that the testator must necessarily have *intended* an interest to be given which is not bequeathed by express and formal words, the Court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the *intention* which it is of opinion he has on the whole will sufficiently declared.

Phelps *v.* Phelps, 148 Mass. 470.
Robinson *v.* Asylum, 123 U. S. 702.
Metcalf Farmingham, etc., 128 U. S. 370.

That no man is bound to make a will in such manner as to deserve approbation from the prudent, the wise, or the good. Testators have a right to be eccentric, capricious, arbitrary, and even unjust, and are, moreover, at liberty to conceal circumstances and the motives by which they have been actuated in their dispositions; and a Court should ever be scrupulous to avoid substituting its intention for the intention of the testator, who has a right to say "Thus I wish it; thus I order it; let my will stand for a reason."

Hart *v.* Tulk, 2 D. G. McN. & G. 213.
Bird *v.* Luckie, 8 Hare. 306.
Hilderson *v.* Lowe, 2 Hare. 355.
Winter *v.* Perrette 6 M. & G. 371.

That the introductory clause or preamble, as well as the concluding part of a will are to be considered in order to ascertain the intention of a testator.

Merson *v.* Blackmore, 2 Atk. 341.
Denn *v.* Gaskin, 1 Copp. 657.
Doe *v.* Allen, 8 Danf. & E. 497.
Davis *v.* Miller, 1 Call. 127.
Ibbetson *v.* Buckwith, Cas. Temp. Talbot, 157.
Ferguson's Lessee *v.* Zipp, 4 Wash. (C. C.) 645.
Beale *v.* Holmes, 6 H. & G. 205.
Butler *v.* Little, 3 Me. 239.
Harvey *v.* Olmstead, 1 N. Y. 231.
Jackson *v.* Harris, 8 Jones, 141.
Wheaton *v.* Andress, 23 Wend. 452.
Rupp *v.* Eberly, 79 Pa. St. 141.
Lippitt *v.* Hopkins, 1 Gall. (C. C.) 454.

That the real estate having been directed by the will to be cenverted into money, it is to be regarded for all the purposes of the case as if it were money at the time of the death of the testator.

Cropley *v.* Cooper, 19 Wall. 167.

That a blending of the proceeds of realty and personalty in one fund for the payment of debts and legacies is generally regarded evidence of an intention to give to the proceeds of a sale ordered the character of personalty throughout.

Given *v.* Hilton, 95 U. S. 591.

That the words "bequest," "bequeath," "legacy," may be construed to apply to real estate where the context of the will shows such to be the *intention* of the testator.

Burwell *v.* Mandeville Exrs., 2 How. 560.
Hope *v.* Taylor, 1 Burr. Rep. 716.
Doe *v.* Toefield, 11 East. 246.

That the word "estate" is applicable alike to real and personal property; that the word "bequeath" may be enlarged by the context to mean "give" or "devise."

Shumate *v.* Bailey, 110 Mo. 411.

That it is a general rule that a codicil will change a will only so far as its intent is manifest.

Wetmore *v.* Parker, 52 N. Y. 450.
McCloskey *v.* Reed, 4 Bradf. 234.

From the foregoing there is deduced the following general and controlling principles:

That property originally vested in the individual by occupancy, and was retained and transmitted by the right of might. That there gradually arose a recognition of a right in the individual owner, or custom, to dispose of the title, in which recognition lies the sanction of the will.

That arbitrary rules of disposition which formerly obstructed the right to transmit property have become obsolete.

That two schemes of legal disposition obtain, the will which the law draws up, and the will which the individual

draws up. That the law can only draw up a will for a man when he is imcomptent, has been subjected to fraud or undue influence, has failed to observe the prescribed formalities, has violated public policy or morals, has revoked his will and failed to make a subsequent disposition, has run counter to statutory provisions of proctection to the widow and children, has attempted to create a perpetuity, has conveyed to persons incapable of taking, or has drawn provisions hoplessly vague and uncertain.

That neither children nor next of kin have a vested right in the property of a testator.

That laws of inheritance rest upon the foundation of general utility and public policy.

That neither legislation nor judicial construction can prevent faults of unwise or even cruel wills without creating more mischief and general inconvenience than is sought to be remedied.

From these may be gleaned the broad general principle: that public policy and the good of the Nation require that the greatest testamentary liberty should be accorded to testators, and that our Courts have slowly but steadily blazed the pathway of testamentary liberty so that not capriciousness, nor cruelty, nor vanity, nor deceit, nor harshness, nor injustice, nor gratifying grudges, nor the bestowel of unwise or improvident bounties can defeat a testator's intention.

If we analize the will and codicil in controversy by these principles. indisputably established, and seeking for the intention of the testatrix from the four corners of the whole instrument, we find that it was her intention:

1. To die testate as to all of her property; for the mere fact of her having made a will furnishes in itself a strong presumption that she had such an intention.

2. To ignore the claims of the collateral relatives, except in the event of the declination of the legatees to accept the bequest.

3. To give a conditional life Estate to her granddaughter.

4. To give the entire property in remainder to two charitable organizations, at the decease of the grand daughter, or upon the forfeiture of the condition.

5. To substitute the legatee, Emeline Colville in the place and stead of the legatee, the Home for Incurables.

The testatrix, for reasons satisfactory to herself, and with which a Court construction has absolutely nothing to do, for she might be capricious if she chose and her will must stand for her reason, desired to revoke and did revoke the bequest to the Home for Incurables. The revocation is as follows: "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the Five Thousand Dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville.

There cannot be even a momentary contention over the statement that in and by the words used by the Testatrix as qouted above there was manifested a clear intention to revoke the bequest to the Home for Incurables and this intention must prevail. Thus we have an intention to revoke and a concurrent intention to bequeath the property included in the revoked clause. One intentian is of as much dignity and force as the other, and both are to be governed by the controlling intention of the testatrix to dispose of her whole property; for the testatrix affords ample proof of her continuing intention to die testate as to all of her property in the codicil itself by the use of the following words: "And I in all other things ratify and affirm my said will." The view that it was the intention of the testatrix to bequeath as a whole what was revoked as a whole receives striking confirmation if we bear in mind what it was the testatrix revoked. It was not "The Five Thousand Dollars," but the bequest." If we reject the words, the "Five Thousand Dollars" as erroneously descriptive and substitute therefore "Bequeath," the codicil would then read: "I hereby revoke

and annul the bequest therein made by me to the Home for Incurables at Fordham New York City, in the State of New York, and I hereby give and bequeath the bequest heretofore in my will bequeathed to said Home for Incurables to my friend Emeline Colville. And I in all other things ratify and affirm my said will."

This construction satisfies the fundamental and universal presumption that the testatrix, in making a will, intended to die testate as to all of her property. It avoids the clumsy, inconvenient, and far-fetched construction that it was only intended by the codicil to give to Emeline Colville five thousand dollars out of the bequest to the Home for Incurables. To maintain such a construction is to claim for the testatrix a work of supererogation, for she was doing a wholly useless thing in revoking the said bequest, a simple bequest in the codicil of five thousand dollars to Emeline Colville would have left the Home for Incurables the residuary legatee.

Of the legal restrictions which could operate against the will of this testatrix, only two can be urged: That a revocation had been made, but no subsequent disposition of the revoked property, or, that its provisions are hopelessly vague and uncertain. Unless one or the other of these two restrictions should be well founded, then the will drawn by the law cannot be permitted to operate.

The controversy then narrows down to the question, did the testatrix make a disposition of her property subsequently to the revocation in the codicil?

Let us assume, for the sake of argument, that the source of the law consisted merely in statutes and in judicial decisions. Then the immense number of reports already in existence, reinforced every year by hundreds of volumes, obviously make it beyond the power of any human intellect to be familiar with them. The law must, therefore, be different to different men, according to the decisions with which they happen to be

familiar. Hence, to every lawyer and judge the law will vary according to his memory, and industry, and to his locality, and the consequent accessibility or inaccessibility of reports.

Our law makes a distinction between principles and the rules of law as established by statute, decision or custom. Rules of law are, from their nature, confined in their operation to classes of cases specifically determined by the express will of the legislator, or by the custom, as the case may be, and cannot be extended to other cases; while on the other hand the principles of the law are principles in the true sense, and are true not only in their explicit statement, but in all their implied logical consequences; hence, also, the corresponding distinction between reasoning from principle and reasoning from authority, the one of which consists merely in applying the established rules of the law to cases coming within their explicit terms, and the other in logical deductions from principles.

The principle of personal liberty or self-ownership being the great fundamental principle of jurisprudence as well applicable to the law of wills as to any other branch of the law, and bearing in mind that the testatrix had an inalienable right to dispose of her whole property as she saw proper, and bearing in mind the further rule that the making of a will is strong presumptive proof of an intention to dispose of her whole property, the Court is not only justified in supplying the needed correction, but bound to do so. It is infinitely more important that the doctrine of testamentary liberty should be maintained than that a disappointed heir in a particular case should be judicially soothed.

It is, therefore, respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be reversed, and that the finding of this Court should be that

the testatrix intended, in and by the codicil to her will, to die testate as to all of her property, and to substitute Emeline Colville in the place and stead of the legatee, the Home for Incurables, thus making her, the said Emeline Colville, the residuary legatee.

Respectfully submitted,

EDWIN SUTHERLAND,

Of Counsel for Appellant, Emeline Colville.

No. 257 & 61.

NOV 4 1898

Supreme Court of the United States.

Sup. Ct. Reporter Thompson for Colville

Filed Nov. 4, 1898.

THE HOME FOR INCURABLES, *Appellant,*

vs.

MARY SPENCER NOBLE *et al.*

No. 61.

EMELINE COLVILLE, *Appellant,*

vs.

THE AMERICAN SECURITY AND TRUST COMPANY.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF FOR APPELLANT EMELINE COLVILLE.

HENRY THOMPSON,
Of Counsel.

Supreme Court of the United States.

THE HOME FOR INCURABLES, Appellant, *against* MARY SPENCER NOBLE *et als.*, impleaded with EMELINE COLVILLE, Defendant and Appellant.	No. 57.
EMELINE COLVILLE, Appellant, *against* AMERICAN SECURITY AND TRUST COMPANY, Respondent.	No. 61.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT EMELINE COLVILLE.

The testatrix, Mary Eleanor Ruth, made and executed her Will on the first day of June, 1892, and on the same day made and executed a Codicil to her Will. Both papers were duly proved and admitted to probate by the Register of Wills for the District of Columbia.

The Record shows that the will and codicil were made under the following circumstances: Mrs. Ruth was an

aged lady who had only one direct heir of her body and blood living at the time of making the will, to wit, a granddaughter, Sophia Yuengling Huston. Mrs. Ruth had had an only son, to whom she was devotedly attached and who had died shortly before the making of the will. It would seem that Mrs. Ruth had reason to fear that the granddaughter might not long survive, and that in making her will she was actuated by two controlling motives: (1) to provide for her grand-daughter in case the grand-daughter should live; (2) in case of the grand-daughter's death to devote her estate to the perpetuation of the memory of her dearly beloved son. The Will accordingly directed that after debts were paid the entire estate should be turned over to the American Security and Trust Company, in trust, to apply the rents, issues and profits of the entire residuary estate to the support and maintenance of the grand-daughter but in case the grand-daughter should die the trust was to immediately cease and the Security and Trust Company was directed to pay the Hospital of the University of Pennsylvania five thousand dollars, "to be used by the said Hospital to endow and "forever maintain a first-class perpetual bed in said Hos- "pital in the City of Philadelphia, said bed to be in the "name and memory of my beloved son, Melancthon Love "Ruth." (Record, p. 8.)

All the rest, residue and remainder of her estate, after the payment of said five thousand dollars, Mrs. Ruth gave, devised and bequeathed "to the 'Home for Incurables' at Fordham, New York City, in the State of New York, its successors and assigns forever, to be used by said 'Home for Incurables,' to endow and forever maintain one or more beds in said Home," also in the name and memory of her beloved son, Melancthon Love Ruth. (Record, p. 8.)

The contingency, which the testatrix feared, soon hap-

pened: the granddaughter died April 4, 1895, being still an infant. (Record, p. 5.) There was then living no near relative of her own blood to whom the testatrix desired to give a single dollar of her estate. It was all to go to perpetuate the memory of her beloved son. The will being executed, on the same day, the testatrix bethought herself that it was not wise to devote her whole estate to the endowment of beds in hospitals in perpetuation of her son's memory, but that the part given to the Home for Incurables in Fordham, New York, might more properly be given to her intimate friend, Mrs. Emeline Colville, who had been also a friend of her son, and who had shown acts of kindness both to the testatrix and her son during the sickness of both, and in the grief and distress of Mrs. Ruth. She accordingly made a Codicil dated and executed the same day with the Will, in which she "revoked "and annulled the bequest made to the Home for Incur- "ables at Fordham, New York City, in the State of New " York, and gave and bequeathed the five thousand dol- "lars heretofore in my Will bequeathed to the said Home "for Incurables, to my friend Emeline Colville, the "widow of Samuel Colville, now living in New York "City; said bequest being on account of her kindness to "my son and myself during his illness and my distress." (Codicil, Record, p. 9.)

This Codicil contains a plain and manifest error and *mistake in description*, a *falsa demonstratio;* because by the will Mrs. Ruth had given to the Home for Incurables, not "five thousand dollars," but "the residue and remainder of her estate," to endow and maintain one or more beds in name and memory of her beloved son. (Will, Record, p. 8.)

This suit was brought by the executor, the American Security and Trust Company, to obtain a judicial construction of the Will and Codicil, and was tried before

Mr. Justice Coxe of the Supreme Court of the District of Columbia, who made a decree on the 25th day of June, 1890 (Record, page 29), adjudging that the legal effect of the Codicil was "to revoke the legacy of $5,000, given in "and by said Will to the Hospital of the University of "Pennsylvania, and to substitute Mrs. Colville as the "legatee of such sum, but not to revoke the bequest in the "Will in favor of the Home for Incurables." (Decree of Justice Coxe, Record, p. 29.) Upon appeal to the Court of Appeals of the District of Columbia the decree of Mr. Justice Coxe was reversed, with directions to enter a decree in conformity with the opinion of the Court. The prevailing opinion of the Court,—Mr. Chief-Justice Alvey dissenting,—was to the effect that the bequest of $5,000 to the Hospital of the University of Pennsylvania remained intact and unaffected by the Codicil; that the rest, residue and remainder of the estate given to the Home for Incurables at Fordham, in the City of New York, was revoked by the Codicil, and that out of this rest, residue and remainder there was bequeathed to Mrs. Colville $5,000. That the testatrix died intestate as to the residue of the estate, which residue should be distributed to the next of kin in accordance with the statutes of distribution. (Record, p. 44.)

Both Mrs. Colville and the Home for Incurables appealed to this Court, from the Decree entered upon the decision of the Court of Appeals of the District of Columbia, and submit that the Court erred in so construing the Codicil, that it revoked the bequest to the Home for Incurables and gave $5,000 of said bequest to Mrs. Colville, and that Mrs. Ruth died intestate as to the remainder of her residuary estate, and it is claimed on behalf of Mrs. Colville that by the Codicil to Mrs. Ruth's Will made and executed the same day as the Will, the bequest to the Home for Incurables was revoked, and

the said bequest given in its entirety to Mrs. Colville; that Mrs. Ruth died intestate as to no part of her property; that the insertion of the words "five thousand dollars" in the Codicil was surplusage and error of description merely, which might and ought to be disregarded, inasmuch as the Court without those words can clearly determine, by reference to the Will the amount of the bequest to Mrs. Colville; and that the true intent and meaning as well as the expressed intention of Mrs. Ruth in the Codicil was to take away from the Home for Incurables the bequest made to that Institution, and confer the same upon her friend, Mrs. Colville, "because of acts "of kindness to my son and myself during his illness and "my distress."

First Point.

It is quite apparent that the Supreme Court of the District of Columbia erred in holding that the Codicil revoked the bequest to the Hospital of the University of Pennsylvania. Where the testatrix, in terms, revoked the bequest made to the Home for Incurables at Fordham in the City of New York, such revocation will take effect not withstanding an error in the description of the revoked bequest; and manifestly such an error of description cannot be held to revoke a bequest made to the Hospital of the University of Pennsylvania, which is not mentioned in the Codicil containing the revocation. The sole connection or supposed connection of the Hospital of the University of Pennsylvania with the Codicil consists only in fact that the sum of $5,000 is erroneously stated *in the Codicil* to be the bequest to the "Home for Incurables," the same sum being the amount which was bequeathed *in the Will* to the Hospital of the University of Pennsylvania.

Second Point.

It is almost equally apparent that the Court of Appeals of the District of Columbia erred in construing the effect of the Codicil to be, that Mrs. Ruth died intestate as to the residue of her estate, except only as to $5,000 given to Mrs. Colville by the Codicil and $5,000 bequeathed by the will to the Hospital of the University of Pennsylvania. It is beyond dispute from a mere perusal of the Will and Codicil (1) that the testatrix had no intention of dying intestate as to any portion of her estate; (2) that she cared nothing for the collateral relatives not of her immediate blood and kin; (3) that her whole purpose was, after the death of her grand-daughter, to use every dollar of her estate to perpetuate the memory of her son; (4) that she concluded upon reflection the very day of making the Will that her son's memory could be better perpetuated by granting the bequest which she had made to the Home for Incurables in New York City to the friend of herself and her son, Mrs. Colville, who resided in the same city, and accordingly she made the Codicil expressly to carry out that intention; and (5) that the Codicil, while accurately carrying out that intention, contains an erroneous recital or misdescription, which is patent, and correctible by a mere reading of the will, and which if wholly omitted does not vitiate the bequest.

(*a.*) It is to be observed that the Codicil does clearly express that intention: (1) it unequivocally revokes the bequest to the Home for Incurables; (2) with equal exactness it gives that which was bequeathed to the Home for Incurables to Mrs. Colville. If Mrs. Ruth had been content to leave it there, no question could arise, but in the endeavor to be precise and describe what the bequest to the Home for Incurables was she, or more likely the scrivener who drew the Codicil, fell into error and mis-

takenly inserted the words "five thousand dollars" instead of "the residue of my estate."

Those words are surplusage. If the Codicil had revoked the bequest to the Home for Incurables, and had left blank the space wherein she attempts to state the sum bequeathed to the Home for Incurables, and had given "the ——— heretofore in my will bequeathed to said "Home for Incurables to my friend Mrs. Emeline Colville, "the widow of Samuel Colville, now living in New York "City, said bequest being on account of her kindness to "my son and myself during his and my illness and my "distress," the Court would have instantly turned to the Will to see what it was which had been bequeathed to the Home for Incurables, but which was now by the terms of the Codicil bequeathed to Mrs. Colville. The fact that she erroneously stated that this bequest was $5,000 instead of the residue of her estate cannot control against (1) the plain intent of the Codicil itself (2) the plain words of the Will, to which reference is made, for Mrs. Ruth specifically refers to the Will and in every other respect "ratifies and affirms" it. (Record, p. 9.)

(*b.*) The maxims controlling in cases of misdescription in testamentary dispositions of property are: "*Falsa demonstratio non nocet, quum de corpore constat*"; and "*Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.*"

"The first rule," says Jarman on Wills (Vol. 2, p. 390, 5th Am. Ed.) "means that where the description is made "up of more than one part, and one part is true but the "other false, there, if the part which is true described the "subject with sufficient legal certainty, the untrue part "will be rejected and will not vitiate the devise." And ALDERSON, *B.*, in *Morrell* v. *Fisher* (4 Exch. 591), says of this rule: "The characteristic of cases within the rule "is that the description, so far as it is false, applies to no

" subject at all, and so far as it is true applies to one " only."

" Misdescription is fatal when total, but when only " partial the inaccurate portion may be disregarded." *Wigram* on Extrinsic Ev., p. 53. The present case comes directly within the rule, and the reason for it.

Mrs. Ruth had indicated, without the insertion of the words " five thousand dollars," by her reference to the Will and by giving to Mrs. Colville the bequest, " heretofore in my Will bequeathed to said Home for Incurables," with accuracy what she desired and intended to give to her friend. It is only when she goes further and attempts needlessly to quote from the Will that she falls into error. Hence the words of the assumed quotation may be erased and expunged and the remaining words fix with certainty the nature and amount of the bequest and the recipient of her bounty. The case is not distinguishable in controlling facts or principle from *Travers* v. *Blundell* (6 Ch. D., 436), where a testator, having under his father's will power to appoint " all ' that part of R.'s estate purchased by me situate at " P., consisting of six specified closes,' appointed all that " part of the property comprised in my late father's Will as " *is therein described as* that part of R.'s estate purchased " by my father situate at P., consisting of ' " *four* closes, and not *six* closes. It was held that all six were well appointed. The reasons given by the Court are, that the appointment was of a certain *corpus* or subject as described by the father's will and representing that description to be in certain specified terms. One of the terms specified differed from the corresponding term of the description actually contained in the father's will, and not being needed for the ascertainment of the subject was rejected as *falsa demonstratio*. In the present case the testatrix in a codicil makes an error in quoting from her own will, dated the same day, instead of the son making it in quoting

from the father's will. In both the error consists in not accurately stating the *corpus* or subject of the devise or bequests in its entirety; but there is sufficient in each instrument, outside of the erroneous description, to fix the precise terms and amount of the gift.

Indeed, it may be taken as the settled doctrine of the English cases, that an erroneous reference in a codicil to the disposition of the will may be disregarded where the intent of the testator is plain.

In *Vaughan* v. *Foakes* (1 Kee., 58), where a testatrix bequeathed the residue of her estate to A, and by a codicil, reciting that gift and that A might die before her, she in that case appointed B and C her residuary legatees, and afterwards the testatrix made a second codicil as follows: "As the death of Mrs. W. (the mother of B and C), has taken place, and as her two children will ultimately become my residuary legatees, the £15 she was to have I give to D." It was held by the Master of the Rolls that the first codicil was not disturbed by the second. "There is a mis-recital," says Lord Langdale, *M. R.*, "of what she had previously "given. She recites that as an absolute gift which is "only a contingent gift. If the word *may* had been "used intead of *will* the recital would have been in exact "conformity with the prior gift."

So also in *Skerratt* vs. *Oakley*, 7 T. R., 492, a testator devised to his wife for life certain leasehold premises at Northwood, and he gave his leasehold estate at Wrentnall and his estate at Northwood, after his wife's death, and the residue of his estate to others. In a codicil executed on the same day he directed that the bequest to his wife in his will should be in full of all her claims on his estate except the estate for life of his "wife and her "assigns in the premises at Wrentnall, anything in the "foregoing will to the contrary notwithstanding." The

widow claimed that she was entitled to the Wrentnall estate under the codicil, it being manifest by the concluding clause that the husband intended to give her something to which she had no right by the will. The Court decided otherwise. Lord Kenyon said that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word "Wrentnall" was written in the codicil instead of the word "Northwood."

In *Smith* vs. *Fitzgerald*, 3 Ves. & B., 2, a testator bequeathed several legacies to be paid out of the debt owing to him from the Nabob of A, and if any of the legatees died before him he gave their legacies to S, and "after "all the legacies are paid, except those mentioned from "the Nabob's debt, as they may require time, all such "balance as shall remain overplus (exclusive of the "Nabob's *willed to S*) to be equally divided among "the trustees." It was held by Sir W. Grant, *M.R.*, that the residue of the debt not exhausted by the legacies was not given to S by implication. He says, "The "language refers to something as already done, some-"thing that he had given, or supposed he had given "to S. If, in the preceding part there was nothing that "could in any way answer the description of what he here "says he had willed to S, there would then be room for "the application of the doctrine that a declaration by a "testator that he had given something is sufficient evi-"dence of an intention to give it, and amounts to a gift. "But the question here is, whether he did not mean to "describe, however inaccurately, that which he had before "actually given. Without denying that a recital of the gift "as antecedently made may amount to a gift, the Court "ought to see very clearly that there is nothing in the will "to which the recital can refer, before it is turned into a "distinct bequest."

In the present case the language used by the testatrix refers to something as already done; something that she has given in the Will to the Home for Incurables, but which "heretofore in my will bequeathed to the said Home for Incurables," she now desires to confer upon her friend Mrs. Colville. If in the Will there was nothing that could in any way answer the description of what Mrs. Ruth here says she had willed to the Home for Incurables, a gift to Mrs. Colville of that which was heretofore bequeathed to the Home for Incurables might be ineffectual. But the fact is, that the testatrix recites in her Codicil, although inaccurately, that which she had before actually given in the Will, the Court can at once make the necessary correction by a mere inspection of the Will to which the Codicil makes reference; or the misdescription may be wholly omitted; and even then the gift of the residue of the estate to the appellant is incontestable.

Other cases in point are found in the English reports: In *Day* v. *Trig* (1 P. W., 286), where one devised "all his freehold houses in Aldersgate Street, London," having in fact only leasehold houses, it was *held* that the word "freehold" rather should be rejected than the will be wholly void, and that the leasehold houses should pass.

In *Goodtitle d. Radford* v. *Southern* (1 M. & Sel., 299), where a testator devised all his farm called Trogues Farm, situate in the Parish of D., now in the occupation of A. C., the testator had two closes, part of Trogues Farm, but not in the occupation of A. C., and the question was whether those two closes passed by this devise. It was held that the devise comprehended the whole of Trogues Farm, which was a plain and certain description, and was not affected by the defective description of the occupation by A. C.

So also in *Down* v. *Down* (1 G. B. Moo, 80), where A devised all his farm and land, called Colt's Foot Farm, situate in or near the parishes of D. W. and T, *now on*

lease to Mary Fields at the yearly rent of £150, it was held that a close of seven acres, called Williamspring, which was a part of Colt's Foot Farm, but was excepted out of Mary Field's lease, as well as out of a subsequent lease granted by the testator to another person, passed the whole farm consisting, as the case elsewhere shows, of about 172 acres, the Court being of the opinion that it was the intention of the testator to pass the whole of the farm, and not that only which was in the actual occupation of Mary Field.

In *Pacey* v. *Nolls* (8 Vin. Abr., 277), it was held that devise of houses and land lying in the Parish of Billing and in a street called Brook Street, was a good devise of lands in Billing Street, the testator having no land in the Parish of Billing.

(*c*) In our own courts the same rule has been frequently followed in cases of misdescription. In *Patch* v. *White* (117 U. S., 210), the testator devised lot No. 6 in Square 403 in the City of Washington, together with the improvements thereon erected. It was shown that the testator never owned lot No. 6 in Square 403, but did own lot No. 3 in Square 406, and also that lot No. 6 had no improvements on it while lot No. 3 in Square 406 had thereon a dwelling house occupied by the testator's tenants. It was held that under the devise lot 3 in Square 406 passed.

In *Gallagher* v. *Quinlan* (10 Appell. Div. (N. Y.), 402), the testator devised No. 97 Oakland Street, Brooklyn, to plaintiff, but testator never owned any other real estate than No. 79 Oakland Street, Brooklyn. It was held that the devise was effective to convey to the devisee the title to No. 79 Oakland Street, for the reason that there was a sufficient description and designation of the premises devised as the testator's house and lot on Oakland Street, and that the *falsa demonstratio*, to wit, the words and

figures "No. 97" might be eliminated or stricken out as surplusage.

In *Govin* v. *Metz* (79 Hun, 461), the testator devised No. 204 Lexington Avenue. He never owned this, but at the time of making the codicil and at his death he did own No. 736 Lexington Avenue. It was held that the clause should be read as if the misdescription, viz., the figures "204" was not inserted therein, in which case the description would be sufficient to vest in the devisee the property No. 736 Lexington Avenue, the only house which the testator owned on such avenue.

In *Rook* v. *Wilson* (142 Ind., 24), it was held that a will devising "my real estate, to wit, the s. e. ¼ of the "s. e. ¼ of a certain section" will pass title to the n. e. ¼ of the s. e. ¼ of such section; it appearing that the latter land was the only land owned by the testator at the time of his death, and it being admitted that it was the land referred to by the testator as "my real estate."

So, in *Priest* v. *Lackey* (140 Ind.,), there was a devise of "the undivided ½ of all the lands of which I may "die possessed, my land being in the n. . ½ of n. e. frac- "tional ¼ of *section 35.*" All the land owned by the testatrix at the time of making the will lay in Section 36. It was held that the land in Section 36 was devised, because from the will it was clear the testatrix meant to devise the land she owned and should die seized of, and such land was found only in Section 36.

In *Eckford* v. *Eckford* (58 N.W. Rep., 1093), the testatrix in terms devised the s. e. ¼ of a certain section, reciting her ownership thereof, when in fact she did not own such ¼ section, but she did own the s. w. ¼ of the section. *Held*, that as the testatrix evidently intended to devise the land owned by her, the false description would not defeat the devise, since by rejecting it enough remained to lead to an identification of the land.

(*d*) The rule *falsa demonstratio non nocet* applies as well to a bequest as to a devise.

In *Roman Catholic Orphan Asylum* v. *Emmons* (3 Brad., 144), the testatrix bequeathed her stock in the *Mechanics'* Bank, New York City. She had no stock in that bank, but owned stock in the *City* Bank to an amount corresponding to the amount bequeathed. It was held that the City Bank stock passed by the bequest. There was here no ambiguity, but there was a misdescription.

In *Dorr* v. *Geary* (1 Ves. Sen., 255), the testator left to his wife £700 in *East India stock*, having none; but he owned £700 *bank* stock. It was decided by Lord Hardwick that the latter stock should go to the widow, rejecting the words "East India" as a misdescription.

In *Boyer's Estate* (174 Pa. St., 16), the testator bequeathed $10,000 to a trustee, to be invested by him, the income to be paid in equal parts to B and A, and provided that "the five thousand dollars of which A receives the "interest during her natural life," should go after her death to a certain hospital. The sum of $5,000 to be held in trust for A was set apart and invested, with the approval of the Orphans' Court, and at the time of the termination of the life estate amounted to more in value than $5,000. *Held*, that the phrase "the five thousand dollars" referred to the *fund* and not to that *particular sum*, and hence the accretions resulting from an increase in the value of the investment passed with the principal sum to the hospital.

(*e*) That the words "five thousand dollars" are mere matter of recital or description, and that the controlling words in the Codicil are those which revoke the bequest to the Home for Incurables and give to Mrs. Colville "what "was heretofore in my will bequeathed to the said Home "for Incurables" is further indicated by this circumstance: The testatrix did not know, and at the time of making the

will could have no means of knowing, how much of her estate after the death of her grandchild, and the determination of the life estate, would remain in the hands of her executor, the American Security and Trust Company, with which to honor the memory of her deceased son. She believed that it would equal five thousand dollars, and hoped that it might be more, because she gave to the Hospital of the University of Pennsylvania five thousand dollars to endow a bed, and to the Home for Incurables the residue to endow a bed or beds; but suppose the residue had been less than five thousand dollars? It cannot be that, under the terms of the Codicil, Mrs. Colville was to receive five thousand dollars, if, as might well have been the result, when the Trustee came to turn over the property on the determination of the life estate of the granddaughter, there had been less than five thousand dollars of the residue after satisfying the bequest to the Hospital of the University of Pennsylvania. The fact that there is more than five thousand dollars, as shown by the bill of complaint, remaining with the Trustee, has no bearing whatever on the proper construction of the Codicil.

Third Point.

The decree of the Court of Appeals of the District of Columbia should be reversed, and the cause remanded to the Supreme Court with directions to enter a decree that Mrs. Ruth, by her codicil, revoked and annulled the bequest of the residue of her estate to the Home for Incurables in Fordham, and gave said bequest of the residue of her estate to the appellant, Emeline Colville, and that Mrs. Ruth died intestate as to no portion of her estate.

Henry Thompson,
Of Counsel for Appellant Colville.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

THE RIGHT HON. SIDNEY ARTHUR TALBOT DE ROS, 22nd BARON DE ROS,

Appellant,

vs.

MARY SPENCER WEBB ET AL.

Appellees.

No. 62.

THE RIGHT HON. SIDNEY ARTHUR TALBOT DE ROS, 22nd BARON DE ROS,

Appellant,

vs.

EMELINE GELVILLE

&

AMERICAN SECURITY AND TRUST COMPANY.

Appellees.

Brief for Appellees, Mary Spencer Webb, Pattie Belle Tilghman, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford D. Harrison, Lydia Caroline Harrison, Eleanor Swanson Willis, Robert Lehigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer and Emily H. Hayden.

HENRY RANDALL WEBB,
JOHN SIDNEY WEBB,
Counsel for Appellees.

LAW REPORTER PRINT.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 57.

THE HOME FOR INCURABLES

vs.

MARY SPENCER NOBLE ET AL.

No. 61.

EMELINE COLVILLE

vs.

AMERICAN SECURITY AND TRUST COMPANY.

Brief for Appellees, Mary Spencer Noble, Pattie Belle Tilghman, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia Caroline Harrison, Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer and Emily H. Hayden.

STATEMENT.

This suit is brought for the purpose of construing the will and codicil thereto of Mary E. Ruth, executed on the first day of June, 1892.

The will (R. 7, 8, 9) bequeaths all of the estate to the

American Security and Trust Company of this city upon the following trusts:

1. To invest and reinvest in certain securities, and pay over to the guardian or guardians of her granddaughter Sophia so much of the annual income as may be sufficient for her maintenance, education and support *until she becomes of the full age of twenty-one years*, after which period the *entire annual income* shall be paid over to the granddaughter for her sole use and benefit for and *during her natural life.*

There is a proviso by which the granddaughter is to forfeit this income at any time by expending any part of it on her father.

In case of the forfeiture above set forth, or the death of the grandchild, the entire estate is to go to two hospitals for certain specified purposes—five thousand dollars to the "Hospital of the University of Pennsylvania," and the residue to the "Home for Incurables" at Fordham, N. Y.

The will further appoints guardians for the granddaughter and an executor of the estate.

On the same day the testatrix made and executed the following codicil to her will:

> "I, Mary Eleanor Ruth . . . do make and publish this codicil to my last will and testament. I hereby *revoke* and *annul* the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, now living in New York City, said bequest being on account of her kindness to my son and myself during his and my illness and my distress." R. 9.

Fifteen days afterwards the testatrix died, and on or about the 4th day of April, 1895, not quite three years afterwards, her granddaughter, Sophia Yuengling Huston, died unmarried before attaining the age of twenty-one. R. 5.

The American Security and Trust Company filed a bill

(R. 2, 3, 4, 5, 6) alleging that it was unable to distribute the estate owing to "ambiguity and inconsistency apparent upon the face of said will and codicil," and praying relief through the direction of the court.

The appellant, The Home for Incurables (R. 14), answered—

> "that the residuary devise to it is not revoked, or if revoked at all, only to the extent of the five thousand dollars ($5,000) mentioned in said codicil."

The appellant, Emeline Colville (R. 16), answered that she—

> "is entitled to all of said estate remaining after the payment of the legacy of $5,000 thereby given to the Hospital of the University of Pennsyvania."

The appellees, who are the heirs-at-law of the testatrix, and her granddaughter, Sophia Yuengling Huston, answered, that the legacy to the Home for Incurables was revoked, and that, therefore, the estate should be distributed to the heirs, subject only to two legacies of $5,000 each to Emeline Colville and to the Hospital of the University of Pennsylvania. R. 25.

The cause came on to be heard on bill and answers before Mr. Justice Cox, who, by his decision (R. 29), sustained the entire claim of The Home for Incurables, and in addition, took away the legacy of the Hospital of the University of Pennsylvania and gave it to Emeline Colville, entirely cutting out the heirs.

The instrument under consideration, as it passed from the hands of the testatrix duly witnessed, published, and declared, read:

> "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville," etc.

The instrument as it passed from the hands of Mr. Justice Cox, read:

> "I hereby revoke and annul the bequest therein *Hospital of the University of Pennsylvania*, made by me to the ~~Home for Incurables at Fordham, New York City, in the State of New York,~~ and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed *Hospital of the University of Pennsylvania* to said ~~Home for Incurables~~) to my friend Emeline Colville, etc."

The Court of Appeals reversed the decree of the special equity term of the Supreme Court of the District of Columbia, holding (R. 44):

> "That it is the true legal intent and meaning of the will and codicil that the bequest of five thousand dollars to the Hospital of the University of Pennsylvania remains intact and unaffected by the codicil; that the bequest of the rest and residue to the Home for Incurables at Fordham, in the city of New York, was and is revoked by the codicil; that out of this rest and residue there is bequeathed to Mrs. Emeline Colville the sum of five thousand dollars, and that the remainder of the estate is distributable to the next of kin in accordance with the provisions of the statute of distributions."

This decision of the Court of Appeals is assigned as error by the appellants.

ARGUMENT.

Reading the will without the codicil, it appears at first blush to be a complete disposition of the testratrix's estate

and a minute and carefully guarded document, and the wonder is why she, *on the same day* should have added the codicil, which we shall proceed to show altered very materially the trend of her bequests.

The duty and power of a court in such a case is obvious; and where ambiguity is shown on the face of a paper, which is submitted to it without other evidence, for construction, the power is not to *change the face of the paper* and decide what the testator might, could or should have done, but what *he did do*; not what he may have meant to devise but what he did devise.

The will gives to the nearest living relative of the testratrix, her only descendant, a young girl with all the possibilities of a long life before her, a *life estate only*. At her death, unless the forfeiture set forth should bring about the same result sooner, the Ruth estate is to be distributed to two hospitals, away from any great-grandchildren of the testratrix who may be in existence at the death of their mother, Sophia.

Moreover, there being no evidence in the case of any kind to show, one way or another, the presumption will be that the granddaughter had the average of life in expectation. Her untimely end only three years after the will was executed can, therefore, not be considered in construing the *intentions of the testratrix*.

But we apprehend that this fact—the death of the granddaughter, unmarried, under the age of twenty-one—is relied upon by the appellants; for the argument has been resorted to that some of the appellees represented the collateral heirs of the half blood and full blood, and the will clearly intended to cut them off. *Undoubtedly the will intended to cut off, also, the great-grandchildren*, and the fact that that possibility of issue was shut out by the death of Sophia does not, and can not, affect a construction of the will and codicil.

The effect of the codicil, setting aside for the moment any

alleged ambiguity, was to strike out the devise of any residue and vest the greater part of the estate in any issue of Sophia Yuengling Huston, subject to the life estate in their mother and their surviving her.

That testatrix might have effected this result in other ways, having due regard to the limitation, "a life and lives in being and twenty-one years thereafter," is not before the court; that this codicil did effect this most obvious, natural and praiseworthy desire on the part of the testatrix is clear beyond a doubt.

Were the children of Sophia Yuengling Huston before the court asking a construction of this will and codicil, and were the question one between the great-grandchildren of Mary E. Ruth and these two charities, the court would see clearly that the *intention* of the testatrix was to undo, by means of the codicil, the wrong unintentionally done her great-grandchildren by the will.

This interpretation of the codicil is the plainest in intent and gives full force and effect to the distinct revocation of the bequest to "The Home for Incurables" which, in any event, must have been postponed until the death of the granddaughter, and in the natural course of events might not have happened for half a century.

That the intention of the testatrix as regards Mrs. Colville was to give her five thousand dollars and five thousand dollars only, we submit, that there can be no doubt; although, in her answer she sets up the claim that it was the entire bequest to the Home for Incurables that the testatrix intended to transfer to her friend "on account of her kindness to my son and myself during his and my illness, and my distress."

If the revocation of the bequest to the "Home for Incurables" is held effective, and no stronger words can be suggested as recognized in law for the purpose of working a revocation, the bequest to Mrs. Colville was five thousand dollars only and is so nominated in the bond; whatever

testatrix may have meant to do for her and from whatever source to be derived, if one thing is certain, it is that the amount was fixed at five thousand dollars.

The ruling of the Court of Appeals was correct, because it is in conformity with the general rule that a will and codicil are to be construed together as one instrument, and are to be reconciled as far as possible, though of course if irreconcilable, the codicil, as the last indication of the testator's mind, must prevail.

Lee *vs.* Prindle, 12 G. & J. 288–305.
Boyle *vs.* Parker, 3 Md. Ch. 44.
Schouler on Wills, Sec. 487.
Crozier *vs.* Bray, 120 N. Y. 375.

It is therefore evident that, if any portion of the will is irreconcilable with the codicil, it must be set aside and declared inoperative, and the codicil prevail.

The codicil unequivocally and in so many words *revokes* and *annuls* the legacy given by *the will* to the Home for Incurables, and that such was the intention of the testatrix can hardly be disputed.

The careful and explicit manner in which the testatrix describes the legatee whose bequest she wishes to revoke—

> "I hereby revoke and annul the bequest therein made by me to the *Home for Incurables at Fordham, New York City, in the State of New York*"—

is in itself a complete refutation of the theory that she wished and intended to revoke the bequest to the other legatee in her will., *i. e.*, "The Hospital of the University of Pennsylvania." There is no similarity in the sound of the names, nor of the localities, nor do the titles of the legatees contain or present any of the many snares or pitfalls to memory usually found in the cases of patent ambiguity.

The contention that the testatrix intended to revoke the legacy given to the Hospital of the University of Pennsylvania, and not that of the Home for Incurables, attempts to

make for the testatrix a will contrary to her intention expressed in her will.

> "It is a fundamental principle of law, that the intention of the testator is to govern in the construction of a will, but it is the intention expressed by *the will* and *not otherwise.*"
>
> Tucker *vs.* Seaman's Aid Society, 7 Met. 188.

> "The plain and unambiguous words of the will must prevail and cannot be controlled or qualified by any conjecture or doubtful constructions growing out of the situation, circumstances or condition of the testator, his property or natural objects of his bounty."
>
> Schouler on Wills, 500, Sec. 466.

But it has been contended that the testatrix, by using the expression—

> "I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend, Emeline Colville"

in the codicil to her will, showed that her intention was to revoke the legacy given in her will to the Pennsylvania Hospital, and give it to Mrs. Colville, and not to disturb the legacy given to the Home for Incurables.

But this is orroneous:

1st. Because it is allowing a positive provision in a will to be controlled by a subsequent vague and uncertain one.

> "An express disposition in an early part of a will must not receive an exposition from a subsequent passage affording only a conjectural inference."
>
> Roach *vs.* Hayes, 8 Ves. 590.
> Barker *vs.* Lea, 3 Ves. & Bea. 117.
> Jones *vs.* Colbeck, 8 Ves. 42.
> Lord Oxford *vs.* Churchill, 3 Ves. & Bea. 67.
> Redfield on Wills, Vol. 1, Ch. 9, 434.

"A clear gift cannot be cut down by any subsequent words unless they show an equally clear intention."

Whelan's Est., 175 Pa. St. 25.
Kiver *vs.* Oldfield, 4 De G. & J. 30.
Sheetz' Appeal, 82 Pa. St. 213.

This rule of law is undoubted, and it seems that the reverse should also be true, that a legacy which has been clearly and unmistakably revoked and annulled should need the clearest and most unmistakable language to revive it.

2d. It is allowing surmise and conjecture to overrule and set aside the clearly expressed wishes and intentions of the testatrix.

"When a clause is in itself intelligible and expressed in apt words, we can not speculate on the motives which might have governed the testator or conjecture that he has failed to express his intention and thus supply it."

Towle *vs.* Delano, 144 Mass. 95.

"Legacies by implication are not supported unless the testator's intention is clear, so that no other reasonable inference can be made."

Grout *vs.* Hapgood, 13 Pick. 164.
Doe *vs.* Sheppard, 1 Doug. 79.
Graham *vs.* Graham, 23 W. Va. 40.
Bradford *vs.* Matthews, 9 Ct. App. 438.

Courts are not permitted to give effect to the will of the testator contrary to the plain and obvious terms used by him upon mere conjecture as to his intention.

Pickering *vs.* Langdon, 22 Me. 429.
Bender *vs.* Dietrick, 7 W. & S. 287.
Hitckcock *vs.* Hitchcock, 35 Pa. St. 397.
Bane *vs.* Wick, 19 Ohio, 333.

Lord Mansfield says:

> "A court may construe a will and from what is expressed necessarily imply an intent not particularly specified in words, but we can not from arbitrary conjecture, though founded upon the highest degree of probability, add to a will or supply omissions."

3 Burr, 1634.
Schouler on Wills, Sec. 466.
Miller *vs.* Travers, 8 Bingh., 244.

3d. This ruling can not be sustained upon the ground of mistake:

The principle of law is well settled to the contrary—

> "Because the testator has made a mistake, you can not afterwards remodel the will, make it what you supposed he would have drawn it, if he had known the incorrectness of his supposition."

Box *vs.* Barrett, Law Rep., 3 Eq. 244.
Holmes *vs.* Constance, 12 Ves. Jr. 279.
Hayes Ex'r. *vs.* Hayes, 21 N. J. Eq. 265.

> "The rule is that wherever there is a clear mistake or a clear omission, recourse is had to the general scope of the will and the general intention to be collected from it; but the first thing to be proved is, that *there is a mistake.*"

Mellish *vs.* Mellish, 4 Ves. 50.
1 Story Eq. Jur. Sec. 180.
Smith *vs.* Maitland, 1 Ves. Jr. 362.
Given *vs.* Hilton, 95 U. S. 594–5.

The court can only find that a mistake has been made from the paper itself, and must not resort to conjecture to change the paper, unless by such change all of the intentions of the testatrix are made clear. The change herein contended for *reads out of the will an unmistakable revocation*

and deliberately robs a legatee of a bequest, not revoked in terms or by necessary implication.

A will can not be corrected by evidence of mistake, so as to strike out the name of the legatee and insert that of another.

Yates *vs.* Cole, 1 Jones Eq. 110.
Fitzpatrick *vs.* Fitzpatrick, 36 Iowa, 674.

"All doubts are to be resolved in favor of the testator's having said exactly what he meant."

Cody *vs.* Bunn, 46 N. J. Eq. 133.

"Plain clear words, read in their ordinary meaning, must always govern in searching for the intention of a testator, unless repugnant to other words equally plain and clear, used in another part of the same will."

Courter *vs.* Stagg, 27 N. J. Eq. 307.

Lord Kenyon, in Lane *vs.* Stanhope, 6 T. R. 352, said:

"It is our duty in construing a will to give effect to the devisor's intention so far as we can consistently with the rules of law; not conjecturing, but expounding this from the words used."

Taylor *vs.* Taylor, 47 Md. 299.

Applying this rule to the will and codicil in question, the one thing which appears most prominent in the mind of the testatrix is her desire to revoke and annul the bequest made to the Home for Incurables. This bequest was not for a specific amount, but was for "all the rest and remainder" of her estate, and was the one which she most probably would revoke. The language used by her is clear and decisive, and can leave no doubt in the mind of anyone as to her intention.

The uncertainty arises from the use of the word "the" before the words "five thousand dollars" in the codicil. No

uncertainty would have arisen had that word been left out and the codicil read as follows:

> "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville."

While this word "the" being where it is in the codicil may raise a question as to whether the testatrix thought she had given the Home for Incurables a legacy of five thousand dollars in her will, or whether she thought she was revoking the legacy of five thousand dollars given to the Pennsylvania Hospital, can in no way affect the revocation of the legacy to the Home for Incurables. That is clearly and pointedly annulled and revoked. No language can be clearer than that which is used in the codicil.

Whether this was done by mistake or not can not be considered. The will and codicil must be construed according to the language used and not according to what language might or should have been used, nor on account of any conjecture as to the intention of the testatrix.

Nor can the word "the" before the words "five thousand dollars" be taken to mean that the testatrix intended to or did give to Emeline Colville the rest and remainder of her estate, or, rather, the same bequest which she had given in her will to the Home for Incurables.

The testatrix' intention, as expressed in the codicil, clearly and unmistakably was to give Emeline Colville the sum of $5,000. Emeline Colville's legacy is expressly limited to $5,000, and she can get no more. The intention of the testatrix is clearly defined in this particular, and can not be changed by mere conjecture.

In Mann *vs.* Executors of Mann, 14 Johns. 9, it was held:

> "That where there is a specific sum named, the extent of the testator's bounty is defined and his will

known; and it is the duty of courts to search for a construction that will carry it into effect."

The appellant, the Home for Incurables, contends that the ruling of Judge Cox was right, but to sustain this contention it must appear that it is the only reasonable presumption under the existing circumstances.

This is not so. It is much more reasonable to presume that the testatrix thought she had given the Home for Incurables a legacy of five thousand dollars in her will, which she wished to revoke by the codicil and give to her friend.

Again, blood being thicker than water, it is, if anything, still more reasonable to presume that she wished her granddaughter's children to have the bulk of her property after her (the granddaughter's) death, and made the codicil accordingly.

The only question of any doubt seems to be whether the testatrix did not intend to also revoke the legacy, given in her will, to the Pennsylvania Hospital.

This is highly probable, for it appears that between the time of the execution of the will and that of the codicil, the testatrix experienced an entire change of heart, and decided to accede to the claims of affection and friendship rather than to those of charity, and to endow the living rather than erect monuments to the dead.

The contention of the appellant, the Home for Incurables, is expressed in the decree rendered by the Special Equity Term of the Supreme Court of the District of Columbia (R. 24), which was reversed by the Court of Appeals. R. 44.

The decree is as follows:

> "It is by the court. this 25th day of June, A. D. 1896, ordered, adjudged, and decreed, that the legal effect of the codicil executed by the testatrix, Mary Eleanor Ruth, on the 1st day of June, 1892, to her will of the same date, as shown in the proceedings, was to *revoke* the legacy of five thousand dollars given in and by said will to the Hospital of the University

> of Pennsylvania, and to substitute Mrs. Emeline Colville as the legatee of said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvania, *but not to revoke the residuary bequest in said will contained in favor of the "Home for Incurables, at Fordham, in New York City."*

To support this ruling the court has to shut its eyes to the natural claims of the testatrix's own great-grandchildren; and to substitute "Hospital of the University of Pennsylvania" in place of "Home for Incurables at Fordham, New York City, in the State of New York," and again in the parenthesis to substitute for "said Home for Incurables," the words "said Hospital of the University of Pennsylvania."

In other words, the court, without any evidence of her intent other than the instrument itself, must take pen in hand and rewrite the codicil thus:

> "I hereby revoke and annul the bequest therein *Hospital of the University of Pennsylvania,* made by me to the ~~Home for Incurables at Fordham, New York City, in the State of New York,~~ and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed *Hospital of the University of Pennsylvania* to said ~~Home for Incurables~~) to my friend Emeline Colville, etc."

To state such a case is to show the error of the decree.

The only ambiguity or uncertainty in the codicil arises from the second part or clause, written in parenthesis, to which Mr. Justice Morris, in the opinion of the court, refers as follows (Rec., 43):

> "We give effect to each and every provision of the codicil and to the will as an entirety by rejecting as

> *surplusage* the *erroneous recital* in the second clause of the codicil, which is no more than a recital and not essential to the integrity of the instrument as a testamentary disposition."

But, if we grant that this clause was a mistake and contrary to the intention of the testatrix, in accordance with the contention of the Home for Incurables, it does not affect the revocation of its legacy, unless we also make the additional and wholly unwarranted change in the first clause.

To read the codicil thus:

> "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed *Hospital of the University of Pennsylvania* to said ~~Home for Incurables)~~ to my friend Emeline Colville, etc."

would only raise the question as to the intention of the testatrix in regard to the legacy of the Hospital of the University of Pennsylvania, and in no way affect the revocation of the legacy of the Home for Incurables.

The uncertainty does not arise as to which legacy is revoked, but only as to what five thousand dollars the testatrix intended to give Emeline Colville.

To grant the contention of the appellant, the Home for Incurables, and hold that the legacy of the Home for Incurables was not revoked by the codicil, the court must decide against the clear and explicit language of the codicil, and so decide relying upon a vague and uncertain subsequent expression which is in no way connected with said revocation but which can be omitted without impairing the sense of the codicil. It must in addition take away from another legatee a legacy, which was plainly *not revoked*, and further take from the heirs their inheritance, which was theirs by

law and of which they can not be deprived except by specific words to that effect or by implication too strong to be withstood.

Such action on the part of the court would be contrary to the words of the codicil, contrary to the intention of the testatrix as expressed therein, and in defiance of the rules of law and justice.

It would be in fact rewriting the will of the testatrix.

> "Interpreters have to deal with the written expressions of the writer's intention and courts of law to carry into effect what has been written, not what it may be surmised, on however plausible grounds, that he intended only to have written."
>
> Jackson *vs.* Alsop, 67 Conn., 253.
> Pack *vs.* Shanklin, 27 S. E., 389.
> Kimball *vs.* Story, 108 Mass., 385.

The Chief Justice of the Court of Appeals, who delivered an opinion dissenting from that of the court, was mistaken in his statement when he said (Record, 45) "that it is conceded upon all sides." First. That it was not the intention of Mrs. Ruth to die intestate as to any portion of her estate. Second. That a mistake was made by the draftsman of the codicil.

The cause being heard on bill and answers and the answers of the heirs containing no such concession from them, we are at a loss to understand how the Chief Justice could have gotten anything to base his erroneous position on.

In the argument we maintained and still do maintain that when a written, witnessed, and executed document is before the court the only thing to be done is to interpret it as it is, not as it might, could, or should have been.

No evidence was taken to enlighten the court on the relations of the testatrix with any of the legatees, and all that was known was in the will and codicil, and so far as that goes it is all that there is to be known of the intentions of the testatrix. How can any court say that she meant to do

other than she did. And even, if her intention had been to do this or that, would not the only question for a court to decide still be: Had she *in fact* done so?

It matters very little now what she intended to do or if the draftsman made a mistake, for the paper before us is offered in evidence duly authenticated as the law requires, and must be the only basis of any judgment.

Patch *vs.* White, 117 U. S., 210.

We contend that after providing for her grandchild for life, Mrs. Ruth thought it best to allow the remainder of her estate, with the exception of the legacy of $5,000 given to her friend Mrs. Colville, to go to the issue of that grandchild. She was then a young girl who had every hope of a long life before her, and it could reasonably have been expected that she would leave children of her own upon her death. Mrs. Ruth most probably did not care to look so far into the future and was content, after providing for the interest of her grandchild, to let the law guard the interests of her great grandchildren. It certainly can not be reasonably supposed that she intended to deprive the issue of her grandchild of all benefits of her estate and possibly force them to become objects of charity.

This last proposition, absurd as it is, forms the principal foundation and is absolutely essential to the claims of both appellants—the Home for Incurables and Emeline Colville.

The appellants and the justice dissenting seem to overlook the intervening life estate of this young girl and the strong possibility at the time of the making of the will of her leaving issue and seek to construe the will exactly as if the testatrix had devised her property directly to the parties to this controversy.

We have always contended that there was no mistake made in the codicil by the draftsman, but that Mrs. Ruth dictated the words of the codicil as they were written, fully intending to revoke the legacy of the Home for Incurables.

The claims of this appellant are based largely upon the arguments in the dissenting opinion:

1. That it can not be supposed that the testatrix intended to destroy the whole scheme of her will by the codicil, and consequently she intended to revoke the legacy, which corresponded in amount to the legacy given to Emeline Colville.

This is best answered by the opinion of the court. R., 44.

Justice Morris says:

> "It would be difficult, in any view that we might take of this case, to find any controlling purpose or guiding intention on the part of the testatrix, inasmuch as the fact that before the ink was dry with which her original will was written, she radically changed her mind in regard to the disposition of her property, is sufficient to raise a doubt whether she had in fact any well-defined purpose in regard to such disposition; and, were we to indulge in conjecture, we would feel no assurance in any conjecture that we might adopt, that we had found the true intent and purpose of the testatrix. We deem it most proper, therefore, to indulge in no conjecture; to take the words of the will and the codicil as they stand, and only to reject as unnecessary one phrase, which is, in fact, unnecessary to the integrity of the will and codicil.
>
> "In arriving at the intention of the testator, so much as is false in the description of the premises devised may be stricken out, and if enough remains to identify the premises intended to be devised, the will may be read and construed with the false words eliminated therefrom."

Hoffman *vs.* Young, 170 Ill. 297.
Whitcomb *vs.* Rodman, 156 Ill. 126.

2. Much stress is laid upon the use of the word "bequest" (R. 45, 46) in the codicil, and the argument is advanced that it was a "bequest," and only a "bequest," that was to be revoked. The only "bequest" given by the will was

given to the Hospital of the University of Pennsylvania, and hence it is argued that its legacy was revoked, and not that of the Home of Incurables.

But this argument is very forced and strained, and if adopted would make the technical name of the gift govern in the construction of wills, and be contrary to the fundamental principle of the law, that the name of the legatee must govern, and not the description of the legacy.

Gillet *vs.* Gane, L. R. 10, Eq. 29.
Burnasconi *vs.* Atkinson, 10 Hare, 345.
Adams *vs.* Jones, 9 Hare, 485.

> "Whether the word 'Bequeath' means the same as 'Devise' when used in a will is to be determined by the connection in which it is found."
>
> Dow *vs.* Dow, 36 Me. 211–216.
> Laing *vs.* Barbour, 119 Mass. 525.
> Lasher *vs.* Lasher, 13 Barb. 109.
> Ladd *vs.* Harvey, 21 N. H. 528.
> O'Toole *vs.* Brown, 3 El. & Bl. 584; 77 E. & L. 584.

It is possible that Mrs. Ruth may have supposed that she had given the Home for Incurables a legacy of $5,000 by her will, which legacy she wished to revoke and give to her friend, Emeline Colville, and for this reason she used the language she did in the codicil.

But this conjecture, reasonable as it is, does not invalidate the revocation of the legacy to tl e Home for Incurables or give Emiline Colville more than $5,000.

It does not deprive the heirs of their inheritance, because the instant the devise to the Home for Incurables was revoked, it became the heirs' by descent, and they can not be deprived of it by mere conjecture.

The general rule, that no one is presumed to make a will without meaning to dispose of all his estate by said will, must yield when such construction can not be implied from the words of the will.

"As a general rule, the court will struggle against an intestacy, but in a case where a share is given by the will and revoked by a codicil without any words of gift to any other person the court must hold that it is undisposed of, and, as to such share, that there is an intestacy."

Ramsay *vs.* Schelmerdine, Law Rep., 1 Eq., 129–134.

But against this general rule another and equally fundamental rule in the construction of wills must be recognized here, viz:

"The heirs-at-law shall not be disinherited by conjecture, but only by express words or necessary implication."

Justice Story says:

"It is not sufficient that the court may entertain a private belief that the testator intended a fee, it must see that he expressed that intention with reasonable certainty on the face of his will. *For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy;* and though the testator *may disinherit him,* yet the law will execute that intention only when it is put in *a clear and unambiguous shape.*"

Wright *vs.* Page, 10 Wheat. 228.
Allen's Exrs. *vs.* Allen, 18 How. 392.
Bradford *vs.* Bradford, 6 Wharton, 244.
Bradford *vs.* Matthews, 9 Ct. App. 443.
Schouler on Wills, Sec. 479.
Ridgely *vs.* Bond, 18 Md. 448.
Wilkinson *vs.* Adam, 1 Ves. & Bea. 466.

Bowie C. J., in Ridgely *vs.* Bond, says:

"In cases of this kind the implication must be plain, and not merely a possible or probable one; *for, the title of the heir-at-law being clear and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification.*"

And in Wilkinson *vs.* Adams, Lord Eldon has said:

> "With regard to that expression, 'necessary implication,' I will repeat what I have before stated, from a note of *Lord Hardwicke's* judgment in Coriton *vs.* Hellier, that in construing a will *conjecture must not be taken for implication*; but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator can not be supposed."

In Brant *vs.* Wilson, 8 Cow. 57, Woodworth, J., says:

> "If the codicil had expressly revoked the devise in the will, then the right of the heir-at-law would be clear."

Hitchcock *vs.* Hitchcock, 35 Pa. St. 397.
Howard *vs.* Peace Society, 49 Me. 288.

But it is a maxim that a testator can disinherit his heirs or next of kin only by leaving his property to others; which has not been done in this will, however plain the intention to that effect may be considered.

Lord Mansfield said, in Deemer *vs.*Gaskin, Comp. 657:

> "Though the intention to disinherit the heir be ever so apparent, he must, of course, inherit unless the estate is given to somebody else; and the reason is that the law provides how a man's estate at his death shall go, unless he, by his will, plainly directs that it shall be disposed of differently."

See Coffman *vs.* Heatnole, 2 L. R. A. 848.
Zimmerman *vs.* Hafer, 81 Md., 347; 23 Wash. Law Rep., 567.
Fitch *vs.* Weber, 6 Hare, 145.
Crane *vs.* Doty, 1 Ohio, 284.

We, therefore, respectfully submit that the decision of the Court of Appeals should be affirmed.

HENRY RANDALL WEBB,
JOHN SIDNEY WEBB,
Counsel for Appellees.

No. 57.

Brief of Blair for Appellee

Clerk Supreme Court U. S.
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JAMES H. MCKENNEY,

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief for Appellee, Hospital of the University of Pennsylvania.

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STATEMENT OF THE CASE.

By the will of the testatrix, executed June 1, 1892 (7 and 8), it appears that a trust is created whereby her only grand-child is given a life interest in the entire estate, of which the executor is directed to make a conversion into personalty, which life estate is subject to "sooner cease and determine at any time when it is ascertained by my said trustee that any part of my said income shall have been given by said grand-daughter, or in anywise expended by or through her, for the use or benefit of Robert J. Huston, from whom her mother, my daughter, obtained a divorce with custody of said Sophia Yuengling Huston, given absolutely to her said mother." (8.)

When the trust thus created ceased, either by the death of the grand-daughter or by the happening of the prior contingency, it is directed by the third clause of the will that "so much of my said estate shall thereupon be conveyed and delivered over by said American Surety and Trust Company to the Hospital of the University of Pennsylvania, as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son, Malancthon Love Ruth.

"All the residue and remainder of my said estate of whatever kind, after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the 'Home for Incurables,' at Fordham, New York City, in the State of New York, its successors and assigns forever, to be used by said 'Home for Incurables,' to endow and forever maintain one or more beds in said home in the name and memory of my beloved son, Malancthon Love Ruth." (8.)

Guardians and an executor are appointed by the subsequent clauses. (8 and 9.)

A codicil, made on the same day, provides: "I hereby revoke and annul the bequest therein made by me to the Home for Incurables, at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend, Emeline Colville, the widow of Samuel Colville, now living in New York City, said bequest being on account of her kindness to my son

and myself during his and my illness and my distress." (9.)

The grand-daughter died after the testatrix, and the executor filed a bill (2-6) for the construction of the will, alleging in paragraph 9 thereof "that because of ambiguity and inconsistency apparent upon the face of said will and codicil, your complainant is in doubt as to whom it should distribute the fund and estate in its hands, and it is advised by counsel, and believes, and hence avers, that it cannot safely proceed further in the administration of the trusts upon it conferred by and under said will and codicil, except under the order and direction of this honorable court." (5.) The case was heard before Mr. Justice Cox in the supreme court of the District of Columbia, who without delivering any opinion signed a decree "that the legal effect of the codicil executed by the testatrix, Mary Eleanor Ruth, on the 1st day of June, 1892, to her will of the same date, as shown in the proceedings, was to revoke the legacy of five thousand dollars given in and by said will to the Hospital of the University of Pennsylvania, and to substitute Mrs. Emeline Colville as the legatee of the said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvania, but not to revoke the residuary bequest in said will contained in favor of the 'Home for Incurables,' at Fordham, in New York City." (29.)

An appeal to the court of appeals of the District of Columbia was taken by all the parties except the executor and the Home for Incurables (the appellant here). That court, by its decree and opinion (36-44), reversed the decree of the court below, and held "that it is the true legal intent and meaning of

the will and codicil that the bequest of five thousand dollars to the Hospital of the University of Pennsylvania remains intact and unaffected by the codicil; that the bequest of the rest and residue of the estate to the Home for Incurables at Fordham, in the city of New York, was and is revoked by the codicil; that out of this rest and residue there is bequeathed to Mrs. Emeline Colville the sum of five thousand dollars, and that the remainder of the estate is distributable to the next of kin, in accordance with the provisions of the statute of distributions." (44.)

On appeal from that decree the cause comes here for hearing.

BRIEF OF THE ARGUMENT.

I. *The codicil revoked the bequest in the will to the Home for Incurables.*

The effect of the codicil (9) from its plain terms, is to revoke the bequest to the Home for Incurables, to give $5,000 to Emeline Colville, and to leave the residue of the estate to the issue of the only grandchild, who, herself, had been the especial object of the bounty of the testatrix, and whose issue would be the natural objects of her bounty.

The language of the codicil mentions the Home for Incurables only, and in its terms applies directly to the said institution. There is no similarity of sound, location, or interest between that institution and the Hospital of the University of Pennsylvania. There is nothing in the codicil itself, except the amount mentioned, which affords any ground for an argument other than that of the revocation of the bequest to the Home. Could language be clearer than this?

"I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York;" and again later in the codicil, "said Home for Incurables."

The force and effect of this language is to show that whatever sum the testatrix may have intended to give Mrs. Colville, she was determined that the institution which she *twice* names should not be the recipient of the bounty previously bestowed upon it by the terms of the will. The sum given to Mrs. Colville is mentioned but *once;* the party whose legacy is revoked is *twice* mentioned and once described by location, city and State.

It is beyond contention that the distinguishing element of a legacy is the object of that legacy, and it is always the case that the object of a legacy is distinguished and fixed in the mind of a testator or testatrix long before the amount of the legacy is determined. How many people there are who can mention the persons named as legatees in their will, but who cannot state with exactness the amount of their respective legacies. It frequently happens that the same person will make numerous wills in all of which the beneficiaries are the same, but the amount to be received by each one is in every case changed. As stated before, a legacy is most clearly designated by referring to the name of the legatee.

The first part of said codicil, namely—

"I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York,"—

is full and complete in itself, and the subsequent uncertain description of said legacy cannot in any way

defeat the clear and explicit revocation contained in the first part of said codicil.

Would a testatrix confound and mistake the Home for Incurables, at Fordham, New York City, in the State of New York, for the Hospital of the University of Pennsylvania, in the city of Philadelphia? Yet the court must hold such a confusion of names to avoid the plain terms of the codicil in a matter wherein will and codicil do not conflict.

If it be once admitted that the codicil does not operate in accordance with its express terms and "revoke and annul the bequest therein made by me to the Home for Incurables, at Fordham, New York City, in the State of New York," then there remain but two solutions of the case, to wit: First, a construction of the will and codicil at variance with their express terms; second, the holding of the codicil as inoperative and void.

II. *If the question be one of the construction of the effect of the codicil and will taken together, in accordance with the rules of construction in cases where patent ambiguities arise, the most reasonable construction is to revoke the bequest to the Home for Incurables.*

a. What was the intent of the testatrix as disclosed by the paper itself? It will not suffice to say that the testatrix confounded the two institutions. The argument that she confounded the amount rather than the beneficiary is more convincing. It is well said that a general purpose and intent of wills is to avoid intestacy, yet it is clear from the language of this will and codicil that the primary object and intent of this testatrix was *to deprive a divorced son-in-law from any participation in or benefit from her*

property. Doubtless she saw, several days before its execution, the scribe who drafted her will, and expressed her wishes to the above effect. She also had the intention to leave a legacy to the Hospital of the University of Pennsylvania, for the payment of the $5,000 given it is charged by special and unusual language upon the fund and executor immediately upon the determination of the trust "to endow and forever maintain a first-class *perpetual* bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son, Malancthon Love Ruth." (8.)

That she had such a disposition of this much of her property clearly in mind is also evident, for she expressly makes the residuary bequest operative "*after* the payment of said five thousand dollars for the establishment of said *perpetual* bed in said hospital." This bed thus to be endowed, and to be maintained, was to be a *perpetual* bed. The adjective "perpetual," used both in the original gift and in the subsequent reference thereto, does not appear in connection with the bequest to the Home for Incurables.

The question then was, what to do with the balance of her estate. The Home for Incurables was a worthy institution, and she still supposed that to keep it away from the *son-in-law* she must give it to some other person. With such instructions she left the scribe, but on her return, several days later, she had meanwhile changed her mind (not an evidence of that fixed scheme of distribution for which the appellant contends), and wished to recognize the kindness of her friend, Mrs. Colville. She also learned that if she allowed the law to take its course,

after these two $5,000 bequests to the Hospital and Mrs. Colville, respectively, the issue of the especial object of her bounty would receive the estate and still to the exclusion of the *son-in-law*. She had already by these two bequests disposed, outside of the family, of nearly half her property as it then existed. Why should not the balance go to those who would naturally be entitled thereto? Would she provide the mother (her grand-child) with the means necessary for comfort and refinement, and then deprive the next generation, if it should arise, of all those means? She saw the wisdom of the law's course, and as the language of the codicil operates revoked the residuary bequest (which had been of the least and last importance in her original scheme of disposition) and gave $5,000 thereof to her friend, Mrs. Colville, leaving the balance to go to the next of kin as descent should cast the same, certain that no portion of her property could ever come into the control of the *divorced son-in-law*, whose existence seems to have created the necessity for the making of the will and whose deprivation from property rights furnished the intent in the mind of the testatrix.

When a person exhibits in a last will and testament sufficient feeling to disinherit an only grandchild "when it is ascertained by my said trustee that any part of my said income shall have been given by said grand-daughter, or in anywise expended by or through her for the use or benefit of Robert J. Huston, from whom her mother, my daughter, obtained a divorce with custody of said Sophia Yuengling Huston, given absolutely to her said mother," (8), the judicial mind need and will not look farther for the motive and intent of the paper.

It is also evident from the will that the testatrix was not aware of the amount of her estate. By the gift to the Hospital of the University of Pennsylvania she makes sure of that bequest, which she wished to be certain, and of the establishment of a "perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son." (8.) She is not certain whether the balance of her estate, by the will given to the Home for Incurables, will establish one or more beds. Hence, when she revokes this bequest to the Home for Incurables and gives $5,000 to Mrs. Colville, she may reasonably have considered that she was disposing substantially of her entire estate.

The will discloses two localities geographically in which the testatrix appears to have been interested, New York City and Philadelphia. By the terms of the codicil she still disposes of her money in New York City. If this codicil were held to revoke that legacy given to the Hospital, the effect would be to dispose of all the estate in *one* locality, instead of the *two* mentioned in the will. Yet it is apparent from the will that the preservation, in Philadelphia, of the "memory of the beloved son," was the first thought in the mind of testatrix when she came to the ultimate disposition of her property.

Much is sought to be made in the argument of the appellant of the fact that the language of the codicil is adapted to the revocation and granting of a bequest. This argument rebounds or falls because of two facts: first, in the will peculiar language is used in creating the legacy to the Hospital, while general terms are used in the grant to the Home; from which facts it is more probable that by gen-

eral terms it was intended to revoke that which was given by general terms; second, the will expressly provided for the conversion of all the decedent's estate into personalty, which makes the language of the codicil the only correct technical language to be used, since the testatrix and scribe have only personal property in mind at the time of the final distribution of the estate.

b. The court has power, where the intention is plain, to insert or transpose words in a will or codicil in order to effectuate a clear intention.

"Where it is necessary in order to effectuate the testator's manifest intention that words should be transposed the court has power to do so."

Baker vs. Pender, 5 Jones, 351.
Linstead vs. Green, 2 Md., 82.
Finley vs. King, 3 Pet., 346-383.

Hence, the court has ample power to insert the words "said bequest" in place of the words "five thousand dollars" where said wording occurs in the codocil, and with such a change the testatrix would have died testate as to her entire estate.

The court can insert the word "thereof" in place of the word "the" in the codicil, by which simple action every doubt and ambiguity is removed, for the codicil would then read "and I hereby give and bequeath *thereof* five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend, Emeline Colville," etc.

III. *The codicil is inoperative and void.*

In the preceding division of the argument attention has been given to the speculative theory of con-

struction, which is necessary to revoke the clear bequest to the Hospital of the University, for, if the court be not persuaded that the codicil revokes the legacy to the Home for Incurables, the question still remains whether the codicil is then operative to revoke any provision of the will. Unless it affects the Home for Incurables, *twice* named in its eight lines, it must be held inoperative, for no other institution is named, and although it is laid down by all books on the subject of the construction and interpretation of wills that the intention of the testator is to govern in the interpretation thereof, there is also an equally well established rule that where there is a clear and explicit devise in the will, ambiguous or uncertain wording in the codicil will not revoke the provision of the will.

"The general position there maintained was that where the terms of the will were clear to give an estate, the words of a codicil must manifest an equally clear intent to revoke it, though if the codicil stood alone its language might seem to require one construction, yet, if the effect of such construction was to revoke a clear grant made by the will, the court will not give it that construction unless the words of revocation by the codicil are equally clear with the language of the grant in the will."

Quincy vs. Rogers, 9 Cush., 290-295.

"Where the devise or bequest in a will is clear and free from doubt the intention to revoke by the codicil must be equally clear and explicit."

Johns Hopkins vs. Pinckney, 55 Md., 365, 381.

"And it is a general rule that in order to revoke a clear devise the intention must be as clear as the devise."

Williams on Executors (6 Am. Ed.), 220.

Mr. Jarmon, in his treatise on wills, says:

"Numerous are the questions which have arisen in regard to the extent to which a codicil affects the disposition of a will or antecedent codicil and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper. In dealing with such cases it is an established rule not to disturb the disposition of the will further than is absolutely necessary for the purpose of giving effect to the codicil."

Jarmon on Wills, p. 176.

Therefore, it is contended by counsel for the Hospital of the University of Pennsylvania that the clear devise to this appellant in the will of Mary E. Ruth cannot be revoked by the uncertain and ambiguous wording of the codicil.

The court in this case should not hold that the codicil revokes the legacy to the Hospital of the University of Pennsylvania, because the codicil itself does not revoke it. In order for the court so to hold, it would have to insert in the codicil wording which is not there and it would entirely change the wording and substance of the said codicil.

The court cannot interpret the will and codicil according to conjecture, but unless it finds that the intent of the testatrix is clear the codicil must fall.

If the court should consider that the codicil contains two designations of the legacy desired to be revoked, each of which designations apply equally to two distinct legacies in the will, then the codicil must fall and is void for uncertainty. If the court should deem that the description by name of the legatee of the legacy sought to be revoked is not a more potent designation than the amount of the legacy, then we

have two designations of the legacy, one of which is equal to the other in certainty, namely, the name of the object of the legacy and the amount of the same. In such a case the codicil must fall, as it is impossible for the court to determine therefrom which of the legacies in the said will is intended to be revoked.

The court must carry out the intention of the testatrix, as that intention can be ascertained from the will and the codicil, but if the testatrix's intention as contained in the codicil cannot be clearly ascertained, then the codicil is void for uncertainty, leaving the provisions of the will only to be carried out.

"We should at the same time deprecate that latitudinarian mode of construction whereby courts have attempted to bridge over every chasm in the lawless resort to conjecture based upon no recognized canons of construction, or, what is still more objectionable, if possible, by an utter disregard of the natural and ordinary meaning of the words used, and guided only by the undefined light of extrinsic circumstances in no sense admissible in aid of the legal construction of the instrument.

"It is laid down by Swinburne that a bequest to any person by name where there are two persons of the same name and no means of determining which was intended, must be wholly void; and we do not perceive any ground of escape from such a result where there is no ground whatever, either in the words or circumstances, to incline us to believe that the testator meant one of the persons of that name more than the other."

Redfield on the Law of Wills, Vol. 2, 385, 386.

"The general principle upon which this opinion proceeds may be stated thus: The testator does, by his will, show a clear and manifest intention to devise the Blomer Hill estate to his wife for life, or

during her widowhood. If such devise in the will is clear it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise. For if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand."

Hearle vs. Hicks, 8 Bingham, 475, 479.

This court in Robison vs. Portland Orphan Asylum, 123 U. S., 702, has said:

"But little aid, however, in such cases is to be derived from a resort to formal rules or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with a view of ascertaining through their meaning the testator's intention.

"In applying this principle the supreme judicial court of Massachusetts, in the case of Metcalf vs. Framingham Parish, 128 Mass., 370, 374, speaking by Gray, C. J., said: 'The decision of this question doubtless depends upon the intention of the testator as manifested by the words he has used, *and an omission to express his intention cannot be supplied by conjecture.*' "

And, again, in Wright vs. Denn, 10 Wheaton, 204, at 239, this court said:

"We may indulge conjectures, but the law does not decide upon conjectures, but upon plain, reasonable and certain expressions of intention found on the face of the will."

If the plain, reasonable and certain expression of intention found in the will in the legacy to the Hos-

pital of the University of Pennsylvania, and the equally plain, reasonable and certain expression of intention found in this language of the codicil—

"I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York,"—

do not satisfy the court, conjectures may be indulged, but the law does not decide upon them, nor supply by conjecture an omission to express intention.

On the whole case it is respectfully submitted that there is no revocation of the clear legacy given by the terms of the will to the hospital of the University of Pennsylvania, and, therefore, the same stands.

HENRY P. BLAIR,
Of Counsel for Hospital of the University of Pennsylvania.

No. 57 and 61.

OFFICE SUPREME COURT U. S.
FILED
NOV 3 1898
JAMES H. McKENNEY,
Clerk.

Brf. of A. McKenney for Security Co.

In the Supreme Court of the United States.

OCTOBER TERM 1898.

Filed Nov. 3, 1898.

HOME FOR INCURABLES, APPELLANT,

vs.

MARY SPENCER NOBLE ET AL.

No. 57.

EMELINE COLVILLE, APPELLANT,

vs.

AMERICAN SECURITY AND TRUST COMPANY.

No. 61.

Appeals from Court of Appeals of the District of Columbia.

Brief for the American Security and Trust Company.

WM. A. McKENNEY,
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AMERICAN SECURITY AND TRUST COMPANY.

No. 61.

Brief for the American Security and Trust Company.

On or about October 2, 1895, the American Security and Trust Company filed its original bill in this case in the Supreme Court of the District of Columbia, seeking a judicial ascertainment of the proper persons to whom it should make distribution of the fund in its hands, under the terms of the last will and testament of Mary E. Ruth, deceased, and a codicil thereto.

The facts in the case are abundantly stated in the Record and in the briefs of counsel for the contending parties.

The American Security and Trust Company has no part in the controversy between the several appellants; it holding the position merely of a trustee and stakeholder, interested only in performing its duty and making distribution of the fund in its hands according to a proper construction of said will and codicil and it now is, as it ever has been, ready and willing to abide by and obey any order and decree which the court may deem fit and proper to make in the premises.

WM. A. McKENNEY,
Solicitor for American Security and Trust Company.

HOME FOR INCURABLES *v.* NOBLE.

COLVILLE *v.* AMERICAN SECURITY AND TRUST COMPANY.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 57, 61. Argued November 9, 10, 1898. — Decided January 3, 1899.

Mrs. Ruth died on the 16th of June, 1892, having on the first day of the same month and year executed both a will and a codicil. After revoking all previous wills and codicils and directing the payment of debts and funeral expenses, the will bequeathed all the real, personal or mixed property to the American Security and Trust Company for the benefit of a granddaughter, Sophia Yuengling Huston, during her natural life. On the death of the granddaughter the will provided that the trust should end, and that it should be the duty of the trustee to pay over to the Hospital of the University of Pennsylvania the sum of five thousand dollars for purposes stated, and to deliver all the "residue and remainder of the estate of whatever kind" to the Home for Incurables, to which corporation such residue was bestowed for a stated object. The codicil was as follows: I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament — I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress. *Held*, That the effect of the codicil was to revoke the bequest of five thousand dollars, made by the will in favor of the Hospital of the University of Pennsylvania, and to substitute therefor the legatee named in the codicil.

MARY E. Ruth died on the 16th of June, 1892, having on the first day of the same month and year executed both a will

and a codicil. After revoking all previous wills and codicils and directing the payment of debts and funeral expenses, the will bequeathed all the real, personal or mixed property to the American Security and Trust Company for the benefit of a granddaughter, Sophia Yuengling Huston, during her natural life. On the death of the granddaughter the will provided that the trust should end, and that it should be the duty of the trustee to pay over to the Hospital of the University of Pennsylvania the sum of five thousand dollars for purposes stated, and to deliver all the "residue and remainder of the estate of whatever kind" to the Home for Incurables, to which corporation such residue was bestowed for a stated object. The codicil unquestionably gave to Emeline Colville a bequest of five thousand dollars. The will and codicil are printed in full in the margin.[1]

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[1] I, Mary Eleanor Ruth, residing in the city of Washington and the District of Columbia, being of sound and disposing mind and memory, do make and publish and declare this to be my last will and testament, hereby revoking and making null and void any and all former wills and codicils by me at any time made.

First. I direct my executor hereinafter named to first pay out of my estate my funeral expenses and all just debts.

Second. I give, devise and bequeath all of my estate, real, personal or mixed, whether in possession, reversion or remainder, now acquired or hereafter to be acquired, and wheresoever situate, to the "American Security and Trust Company" of Washington city, District of Columbia, its successors and assigns, in trust nevertheless for the following uses and purposes only, that is to say —

To invest and to reinvest the proceeds of my said estate in its discretion from time to time in any of the following classes of securities; that is either in United States bonds or in municipal or state bonds or in first mortgage bonds of dividend paying railroads or in loans secured by first trusts upon real estate in the District of Columbia, said loans not to exceed three fourths market value of said real estate; and to pay over so much of the annual income from said investments and reinvestments to the guardian or guardians of my granddaughter Sophia Yuengling Huston, as may be sufficient to provide for her maintenance, education and support until she becomes of the full age of twenty-one years, after which period the entire income so annually received from said investments and reinvestments shall be paid over by said trustee to my said granddaughter for her sole use and benefit for and during the period of her natural life. Provided, however, that the income thus provided for my said granddaughter for and during

Statement of the Case.

In October, 1895, the American Security and Trust Company, alleging the death of the granddaughter and the termination of the trust, filed a bill to obtain a construction of the will and codicil, to the end that it might be enabled to distribute the estate, and thus be legally discharged from all

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the term of her natural life shall sooner cease and determine at any time when it is ascertained by my said trustee that any part of my said income shall have been given by said granddaughter, or in anywise expended by or through her for the use or benefit of Robert J. Huston, from whom her mother, my daughter, obtained a divorce with custody of said Sophia Yuengling Huston given absolutely to her said mother. In case the income shall so cease and determine before the death of my said granddaughter then said income, and all accumulations thereof and the entire principal of said trust estate shall be disposed of as provided in the next succeeding item of this my last will and testament.

I further authorize my aforesaid trustee to sell any portion of the estate herein conveyed to it in trust as aforesaid and to invest and reinvest the proceeds as hereinbefore provided, giving to purchasers good and sufficient deeds or other evidences of title, without obligation upon the part of said purchasers to see to the application of the purchase money.

Third. In the event of the death of my said granddaughter Sophia Yuengling Huston, or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the "American Security and Trust Company" shall cease and be determined, and so much of my said estate shall thereupon be conveyed and delivered over by said American Security and Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth.

All the residue and remainder of my said estate of whatever kind after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the "Home for Incurables" at Fordham, New York city, in the State of New York, its successors and assigns, forever to be used by said "Home for Incurables" to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth.

Fourth. I nominate and appoint Mary Robinson Wright, wife of J. Hood Wright, of New York city, and Mary Robinson Markle, wife of John Markle, of Hazleton, Pennsylvania, and the survivors of them, to be the guardians or guardian of the property and the person of my said granddaughter Sophia Yuengling Huston, they and each of them being my valued friends and having consented to act in that behalf.

Fifth. I hereby nominate and appoint the "American Security and

obligations in the premises. The bill charged that, considering the will and codicil together, there was uncertainty whether the five thousand dollars given by the codicil to Mrs. Colville revoked the bequest in favor of the University of Pennsylvania or substituted Mrs. Colville, in whole or only in part, in the place and stead of the Home for Incurables as to the gift in the will to that institution.

The Hospital of the University of Pennsylvania, the Home for Incurables, Emeline Colville and the heirs at law of the decedent were made parties to the bill. The Hospital of the University of Pennsylvania by its answer denied that there was any ambiguity in the will in regard to the bequest made to it, and averred that such bequest was in nowise impaired by the codicil. The Home for Incurables, although conceding by its answer that there was an ambiguity arising from the will and codicil considered in juxtaposition, yet alleged that the codicil did not in any respect diminish the bequest and devise of the residuum made to it by the will, or, if it did, operated to do so only to the amount of five thousand dollars. Emeline Colville, by her answer, whilst admitting that there was ambiguity in the will and codicil considered together, averred that such ambiguity was patent, and was resolvable by settled rules of construction. She averred that, applying such rules, it was clear that the codicil operated to revoke the bequest and devise of the residuum of the estate made in favor of the Home for Incurables, and

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Trust Company" of Washington city, District of Columbia, to be the sole executor of my estate.

I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament — I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

In witness whereof I have hereto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will.

Counsel for Parties.

had substituted Mrs. Colville as the residuary devisee after the payment of the amount of the bequest in favor of the Pennsylvania institution. The heirs at law by their answer, whilst admitting that the codicil gave Emeline Colville five thousand dollars, also asserted that the gift of the residue made by the will, in favor of the Home for Incurables, was revoked by the codicil, and therefore that after payment of the legacy of five thousand dollars given to the Hospital of the University of Pennsylvania, and a like amount due to Mrs. Colville under the codicil, the remainder of the estate passed to them, since as to such remainder the decedent was intestate.

The trial court found that the codicil gave Emeline Colville five thousand dollars, and substituted her to the bequest made in favor of the Hospital of the University of Pennsylvania; hence, it decreed Mrs. Colville entitled to the five thousand dollars and that the Pennsylvania corporation took nothing. It further decreed that the other provision of the will, that is, the disposition of the residuary estate in favor of the Home for Incurables, was unaffected by the codicil.

The Court of Appeals, to which the controversy was taken, whilst agreeing that the codicil gave Mrs. Colville five thousand dollars, and that she was entitled to this sum, held (the Chief Justice dissenting) that the effect of the codicil was to revoke the bequest and devise of the residuum in favor of the Home for Incurables, and therefore that Mrs. Ruth, as to the entire remainder of her estate, after paying the legacies to the University of Pennsylvania and Mrs. Colville, had died intestate, consequently that the residue of the estate should be distributed among the heirs at law. 10 App. D. C. 56.

Mr. George H. Yeaman and *Mr. J. S. Flannery* for the Home for Incurables. *Mr. George C. Kobbe* was on their brief.

Mr. Henry P. Blair for the Hospital of the University of Pennsylvania.

Mr. Henry Thompson for Mrs. Colville. *Mr. Edwin Sutherland* filed a brief for same.

Mr. Henry Randall Webb and *Mr. John Sidney Webb* for Mrs. Noble and others.

Mr. William A. McKenney submitted on behalf of the American Security and Trust Company.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

It will subserve clearness of understanding to accurately define at the outset the real contentions which underlie the issues presented.

It is not gainsaid by either of the beneficiaries under the will that the plain intention of the testatrix expressed in the codicil was to give Mrs. Colville the sum of five thousand dollars. Indeed, assertion that there was doubt on this subject could not reasonably be made in view of the explicit terms of the codicil. The uncertainty which it is alleged exists in the codicil is solely as to which one of the beneficiaries, named in the will is to be affected by the payment of the sum given by the codicil. Each of those benefited by the will in substance asserts that the codicil is certain in so far as it manifests the intention of the testatrix to give, and that it is equally certain as to the fund from which the payment is to be made, provided such fund is found to be the provision made by the will in favor of the other. The arguments hence at once resolve themselves into the single assertion that, although the gift made by the codicil is certain, its enforcement may or may not be possible, depending on the particular fountain from which it may be concluded the testatrix intended the stream of her benefaction should flow. And although differing in form of statement, the contentions upon which the legal heirs and Mrs. Colville base their claim of right to the residuary estate substantially conduce to a like, although more aggravated, result. The first (the legal heirs) concede the certainty of the intention of the testatrix as expressed in the codicil to give a specific sum to Mrs. Colville, but claim that in the execution of this defined purpose the testatrix

brought about uncertainty as to the entire residuum of her estate, since intestacy, it is claimed, was created in that regard. The second (Mrs. Colville), whilst equally granting the clear purpose of the testatrix, by the codicil, to give her only the sum of five thousand dollars, yet argues that this purpose has been so expressed as not only to give the sum intended but the entire remainder of the estate besides.

Before approaching the text of the will and codicil we will notice an erroneous statement of the rule of law by which it is claimed the assertion that the codicil is uncertain is to be tested, and will also state the general scope of the power which courts of equity will exert to correct mistakes in wills and the cardinal rule of construction which they adopt in so doing.

It is strenuously argued that unless it be found that the codicil takes away from one of the beneficiaries named in the will the whole or a portion of what the will gives, by language as clear and as free from ambiguity as that contained in the will, the codicil is void for uncertainty, and the provisions of the will remain unaffected. This broad proposition is unsound, and the authority by which it is apparently supported has been explained or qualified. Thus in *Randfield* v. *Randfield*, 8 H. L. 225, Lord Campbell (p. 234) stated the rule as follows:

"The *ratio decidendi*, upon which it is said that the Vice Chancellor held that no operation is to be given to the limitation over on the death of the son without issue, 'If you have a clear gift it shall not be cut down by anything subsequent, unless it is equally clear,' appears to me to be insufficient. If there be a clear gift, it is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down, but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity."

And in the same case, Lord Wensleydale, at p. 237, said:

"The gift being in terms absolute cannot be cut down, unless there is a sufficiently clear indication of an interest [intent?] to defeat it by the subsequent clause. I quite agree with the Lord Chancellor in the construction of those words

to which he referred, that you need not have a clause equally clear, but it must be reasonably clear, and the clause to which that effect is attributed by the respondents is capable of a construction confining its effect to the real estates only."

And this rule of reasonableness is applicable, with peculiar potency, to a case like the one now before us, where the effect of defeating the codicil for uncertainty will confessedly frustrate the clear intention of the testatrix. In this connection the language of Lord Brougham, concurred in by the House of Lords in *Winter* v. *Perratt*, 6 Mann. & Gr. 314, 359, is pertinent:

"We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favor of one view rather than another, before we reject the whole. It is true the heir at law shall only be disinherited by clear intention; but if there be ever so little reason in favor of one construction of a devise rather than any other, we are, at least, sure that this is nearer the intention of the testator, than that the whole should be void and the heir let in.

"The cases where courts have refused to give a devise any effect, on the ground of uncertainty, are those where it was quite impossible to say *what* was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested, and seemed equally entitled to the preference. . . . On this head, it may further be observed, that the difficulty of arriving at a conclusion, even the grave doubt which may hang around it, certainly the diversity and the conflict of opinions respecting it, and the circumstances of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great that it amounts to an impossibility; the doubt so great that there is not even an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have we any right to

regard the discrepancy of opinions as any evidence of the uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases, where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty."

No less clearly marked out is the conceded authority of a court of equity to correct mistakes in wills and to enforce the real intention of the testator by giving that construction which accomplishes such purpose. Story, 1 Eq. Jur. 12th ed. p. 174, says:

"SEC. 179. In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them, when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least since the Statute of Frauds, which requires wills to be in writing, (whatever may have been the case before the statute,) parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.

"SEC. 180. But the mistake, in order to lead to relief, must be a clear mistake, or a clear omission, demonstrable from the structure and scope of the will. Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity. So, if there is a mistake in a name, or description, or number of the legatees, intended to take, or in the property intended to be bequeathed, equity will correct it."

In *Hardenbergh* v. *Ray*, 151 U. S. 112, at p. 126, the court, through Mr. Justice Jackson, thus stated the doctrine:

"The cardinal rule for the construction of wills, to which all other rules must bend, as stated by Chief Justice Marshall in *Smith* v. *Bell*, 6 Pet. 68, 75, is, that 'the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the *will* of the person who makes it, and is

defined to be "the legal declaration of a man's intentions, which he wills to be performed after his death." These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law.'" See also *Colton* v. *Colton*, 127 U. S. 300.

We come then to the text of the will and codicil in order to consider, first, whether the bequest and devise of the remainder, which the will makes, is in whole or in part affected by the codicil; and, second, if not, whether the codicil substitutes Mrs. Colville to the bequest in favor of the Hospital of the University of Pennsylvania, thereby revoking the gift of five thousand dollars made to the said hospital and conferring that sum upon Mrs. Colville.

The language of that portion of the will with which we are now concerned is as follows:

"Third. In the event of the death of my said granddaughter Sophia Yuengling Huston or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the 'American Security and Trust Company' shall cease and be determined, and so much of my said estate shall thereupon be conveyed and delivered over by said American Security and Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth.

"All the residue and remainder of my said estate of whatever kind after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the 'Home for Incurables' at Fordham, New York city, in the State of New York, its successors and assigns forever, to be used by said 'Home for Incurables,' to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth."

The codicil says:

Opinion of the Court.

"I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament — I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

"In witness whereof I have hereto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will."

It is apparent that the portions of the will which are in question contain but two provisions, first, a bequest of five thousand dollars to the Hospital of the University of Pennsylvania, and, second, a bequest and devise of the entire remainder of the estate to the Home for Incurables. This is so self-evident as to require nothing but statement. The codicil, it is obvious, makes one bequest only, that is, five thousand dollars to Mrs. Colville. It points out the source whence this sum is to be taken, by designating the particular fund created by the will from which the same is to be obtained. This designation is made in a twofold way: First, by naming the person in whose favor the will gives a right, thereby pointing out that it is the fund given to such person which is to be drawn on in order to execute the gift in favor of Mrs. Colville. Second, it also designates the source whence the five thousand dollars is to be taken, by describing the character of the bequest in the will which is to be used to pay the legacy created by the codicil. As a result the codicil revokes the bequest in the will upon which it operates and substitutes the beneficiary named in the codicil for the beneficiary under the will. The controversy arises from the fact that there is conflict between the two designations made by the codicil, the name on the one hand and the character of the thing given on the other.

This conflict plainly appears from a consideration of the text of the codicil: "I hereby revoke and annul the bequest therein" (that is, in the will) "made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville." That these words show a change of purpose as to a gift of five thousand dollars found in the will and a substitution of the new beneficiary for the one mentioned in the will, is beyond reasonable doubt demonstrated by the text. The revocation made by the codicil is but consequent on the gift to the new legatee of "the" sum "heretofore in my will bequeathed," and thus makes it patent that the revocation and the gift are truly one and the same act of volition, and that they arise from and depend one on the other. Which then of the two designations in the codicil contained is the controlling one, or, otherwise stated, which was mistakenly used by the testatrix?

The language revoking and annulling in the codicil is "the bequest therein (that is in the will) made by me." The gift by the codicil is a bequest of "the five thousand dollars heretofore in my will bequeathed." Now the only clause in the will to which this description can possibly apply is the single and only specific bequest found in the will, that is, the five thousand dollars given by the will to the Hospital of the University of Pennsylvania. It follows that the only possible subject to which the codicil can apply is the only one found in the will to which the description can possibly relate, and which it defines with certainty and clearness. To adopt the designation which the codicil gives when it states the name of the beneficiary of the provision in the will would absolutely destroy the description of the character of the thing stated in the codicil, since there is nothing given by the will to the Home for Incurables which comes under or can possibly be embraced within the specific description contained in the codicil of the object of gift to be affected. Now, as it is manifest from the codicil that the purpose of the testatrix was but, in making the codicil, to change the benefit by her

conferred under the will only to the extent of the bequest found in the will of five thousand dollars, and that her sole intent was to confer this gift on a new person, it would follow if the mention by the codicil of the name of the supposed recipient of the gift were allowed to control, that the thing revoked would be dominated by the mere name, the representative would be greater than the thing it stood for, and the plain intent and purpose of the testatrix, apparent on the face of the codicil, would be frustrated. Moreover, a yet more serious departure from the words and intention of the testatrix would result. It is plain from the will that the fixed design of the testatrix was to provide for the disposition of her entire estate; that is, that she assiduously sought to avoid intestacy as to any portion thereof. But if the name mentioned in the codicil be allowed to destroy the accurate description of the nature of the thing upon which the codicil operates, intestacy as to the remainder of the estate would arise, since such result must flow from the assumption that the revocation made by the codicil relates to the devise of the remainder of the estate made by the will. To hold that the name in the codicil controlled the description would be tantamount to saying that although the testatrix intended, and had stated such intention in clear language, to dispose of all her estate, yet by writing the codicil she had become intestate to the full limit of all the remainder. Besides, to thus construe the will would be to declare that the greater portion of the codicil was wholly unnecessary and meaningless; for, if the intention had been that the sum given should be paid by diminishing the remainder, then all reference to the particular gift which was to be operated upon was superfluous.

The intention of the testatrix as shown by the entire codicil is greatly fortified by considering that the context of the will and codicil establish, beyond cavil, that they were written by one familiar with the technical legal terms, and hence that the provisions found in both instruments were carefully made to conform to legal phraseology. Now, the thing revoked is called in the codicil "the bequest" made in the will, which contradistinguishes it from the bequest and devise of "all

the residue and remainder" of the estate of the testatrix "of whatever kind," which the will contains.

The reasoning by which it is contended that the designation by name found in the codicil must be held as dominant and must be construed as obliterating the clear and legally precise indication of the thing intended to be revoked, which the codicil itself affords, does not commend itself to our approval. That reasoning thus proceeds: The codicil contains a revocation and a gift. The two are wholly distinct, the one from the other. As therefore the revocation refers by name to the bequest made to the Home for Incurables, and revokes it, therefore the provision made by the will for testacy as to the entire remainder is destroyed, even although the gift made by the codicil is only of five thousand dollars, and despite the fact that it plainly, by its terms, refers solely to a bequest of that amount made in the will. But to adopt this view compels a distortion of the language of the codicil, a mutilation of its context, and a division of its provisions into two distinct and substantive matters, when in fact on the face of the codicil it contains but one provision, a revocation and a gift, the one dependent upon the other, the one caused by the other; that is to say, a revocation made in order to give and a gift made solely of the thing revoked. Indeed, to support the view that because the name of the Home for Incurables is stated in the codicil, that instrument had reference to the bequest and devise of the remainder of the estate made by the will, requires not only the arbitrary division of a single sentence in the codicil into two parts, although they are indissolubly connected, but also necessitates a misconstruction of another portion of the will. This follows from the fact that even although the revoking part of the sentence be alone taken into view, dissevered from that with which it is connected in the codicil by a union of thoughts and of words which cannot be disassociated, the codicil cannot be said to apply to the gift of the remainder without destroying the signification of its language. The thing annulled and revoked by the codicil is not the bequest and devise of the remainder, but *the bequest* by the will made. The language of the codicil

is: "I hereby revoke and annul the bequest therein made by me." But only one "bequest," that is, the one for five thousand dollars, existed in the will. To cause the word "bequest" to refer to the remainder is to enlarge its scope and significance beyond its legal import. True, to justify the construction that the word "bequest" is synonymous with a bequest and devise of the remainder, it is said that the testatrix by her will "directed" the trustee to sell the real property and to convert all the estate into personal property, and therefore that it might well have been contemplated by her that when the time arrived for a distribution of the estate that the remainder would consist solely of personal property, and therefore, in mental contemplation, the testatrix may naturally have assumed that the transmission of the remainder would be but a bequest exclusively of personal property. This overlooks the fact that the will and codicil were written on the same day; that the period when the life estate was to cease and the gifts made by the will were to become operative was necessarily wholly uncertain, and that the terms of the will and codicil evidently relate to the condition of the estate at the time that they were made and not to that which might exist at a subsequent and uncertain period. The reasoning moreover must rest on a self-evident disregard of the terms of the will, which does not, as is expressly asserted to be the case, "*direct*" the trustee to convert the real estate into personal property, but simply "*authorized*" it to so do.

And this analysis which demonstrates that the terms of the codicil do not apply to the bequest and devise of the remainder so as to bring about intestacy, also with equal conclusiveness shows that the codicil cannot be construed as reducing the bequest and devise of the remainder to the extent of the five thousand dollars which the codicil gives. To so construe it would be to obliterate the words "the five thousand dollars heretofore in my will bequeathed." It would be to assume that a revocation of a gift in the will had been made by the codicil when there was no necessity for so doing, for if the testatrix had intended simply to give five thousand dollars out of the residue, the mere expression of an intention to give

five thousand dollars would have been entirely sufficient in law to effect such purpose without the slightest necessity of any revocatory clause whatever. This is but to state in another form the abounding reason we have already mentioned, that the express result of the words of the codicil was not alone to revoke a provision of the will, but to do so solely to the extent and for the purpose of executing the new intention conceived by the testatrix by dedicating a particular and named bequest made by the will to the new purpose, and, hence, that the thing selected for revocation and substitution was accurately described in the codicil, omitting the name of the beneficiary thereof, as "*the* bequest" . . . "of five thousand dollars heretofore in my will bequeathed." Considered in its ultimate aspect, the proposition that the codicil gave five thousand dollars to the legatee named therein out of the remainder necessarily affirms that the codicil relates to the remainder, and therefore asserts that the testatrix intended not simply to revoke in order to substitute the new beneficiary to the specific sum revoked, but to create an independent provision wholly disconnected from the bequest made by the will. But this cannot be maintained without striking out the major part of the codicil, and thus frustrating the plain intention of the testatrix unambiguously expressed in the letter and obviously within the spirit of the instrument.

As, then, the codicil does not, in whole or in part, refer to the bequest and devise of all the residue and remainder made by the will in favor of the Home for Incurables, it remains only to consider whether it operates upon the bequest of five thousand dollars made by the will in favor of the Hospital of the University of Pennsylvania. If it does, it substituted the legatee named in the codicil for the institution in question. If it does not, the codicil is void for uncertainty, since there is no other source from which the sum to execute the gift which it makes can be taken. Conversely it results that all the reasoning by which it has become manifest that the codicil did not either apply to the gift of the remainder, establishes that it does so apply to the gift made by the will in favor of the Hospital of the University of Pennsylvania. In

the first place the gift to that corporation is the only specific bequest found in the will, and in the second place it is of the same amount as that named in the codicil. It is therefore embraced within the strictest letter of the description given by that instrument, "the bequest therein (in the will) made by me," and "the five thousand dollars heretofore in my will bequeathed." And a consideration of the whole scope of the will strengthens the force of the language of the codicil. The bequest of five thousand dollars given by the will to the Hospital of the University of Pennsylvania was to be used by it "to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth." The bequest and devise of "all the residue and remainder of my said estate of whatever kind" in favor of the Home for Incurables was "to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth." The purpose then of both gifts was the same. Now, the declared motive generating the making of the codicil in favor of Mrs. Colville was "on account of her kindness to my son and myself during his and my illness and my distress." The natural interpretation of the intention upon which the three provisions rests is reasonably as follows: Having provided for the perpetuation of the memory of the son by the execution of works of charity of substantially the same nature by two different institutions, the one by the use of five thousand dollars to support one bed, and the other and more important by the application of all the residue and remainder of the estate to support one or more beds, when the mind of the testatrix came to the conclusion that her tenderness to the memory of her son should be manifested by a gift to one who had befriended him, the means of executing this thought which she selected was this, not the revocation or impairment of the greater provision made by the will for honoring the memory of the son, but the transfer of the previous and lesser provision of five thousand dollars to the new legatee. By this means the general plan expressed by the will was unaltered,

despite the execution of the conception which the codicil embodied. It may, in consonance with reason, be considered that the testatrix, whose mind, as the codicil shows, was charged with the recollection of the purposes expressed in her will, should have inadvertently used a wrong name, especially as each of the beneficiaries under the will were to apply the thing given to a like good work. It cannot, however, without denying the reason of things, be successfully asserted that although the testatrix specifically pointed out the clause in her will which she revoked, nevertheless by the mere mistaken use of the name of the person she destroyed or intended to destroy the plain and specific description which she vividly embodied in the very sentence where the name was inadvertently stated.

From the foregoing, it results that the use of the name Home for Incurables, in the codicil, was but a mere mistaken designation, dominated and controlled by the description of the character of thing to be affected by the codicil stated therein. Guided by the principles enunciated in the authorities to which reference at the outset was made, such mere mistake may be corrected, in construing the will, by disregarding the error and following the full and accurate description which will then be contained in the instrument; and hence that the effect of the codicil was to revoke the bequest of five thousand dollars, made by the will in favor of the Hospital of the University of Pennsylvania, and to substitute therefor the legatee named in the codicil.

The decree of the Court of Appeals of the District of Columbia must be reversed, and the cause remanded to that court with directions to affirm the decree of the Supreme Court of the District, the costs of all parties to be paid out of the estate, and it is so ordered.

Mr. Justice Gray, not having heard the argument, took no part in the decision of this case.